



REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

¹²
SUPREME COURT

1474
OF

LOUISIANA.

Volume XXXI.

FOR THE YEAR

1879.

PERCY ROBERTS,
REPORTER.

NEW ORLEANS:
F. F. HANSELL, PUBLISHER, 30 AND 36 CAMP STREET.
1880.

UNIV. OF MICH. LAW LIBRARY

STANDARD
ELECTRIC

THE STANDARD ELECTRIC CO. INC.

NEW YORK, N. Y.

INCORPORATED IN NEW YORK

1914

NEW YORK, N. Y.

NEW YORK, N. Y.

NEW YORK, N. Y.

NEW YORK, N. Y.

NEW YORK, N. Y.

NEW YORK, N. Y.

NEW YORK, N. Y.

NEW YORK, N. Y.

NEW YORK, N. Y.

NEW YORK, N. Y.

NEW YORK, N. Y.

NEW YORK, N. Y.

NEW YORK, N. Y.

NEW YORK, N. Y.

NEW YORK, N. Y.

NEW YORK, N. Y.

NEW YORK, N. Y.

NEW YORK, N. Y.

NEW YORK, N. Y.



JUSTICES
AND
OFFICERS OF THE COURT
DURING THE TIME OF THESE REPORTS.

CHIEF JUSTICE,
THOMAS COURTLAND MANNING, LL.D.

ASSOCIATES,
ROBERT HARDIN MARR,
ALCIBIADE DEBLANC,
WILLIAM BRAINERD SPENCER,
E. D. WHITE.

ATTORNEY GENERAL,
HORATIO NASH OGDEN, Esq.

ASSISTANT,
JAMES CONSTANTINE EGAN, Esq.

REPORTER,
PERCY ROBERTS, Esq.

CLERKS,
ALFRED ROMAN.....NEW ORLEANS.
BENJ. R. ROGERS.....OPELOUSAS.
TALBOT STILLMAN.....MONROE.

213-11

THINK OF COURT

RULES

OF THE

SUPREME COURT.

REVISED AND ADOPTED MAY 30, 1878.

RULE I.

1. In preparing transcripts of records, in causes appealed to this Court, clerks of lower courts must observe the following requirements:

First—Such transcripts should be written in a fair, legible hand, on good, strong paper (the latter having a double margin on each page thereof), and the various parts should be securely fastened together.

Second—The different portions of a record should be made to appear in the order of their respective filing.

Third—Provided, however, that when the records of one or more other suits are introduced as evidence in a cause, such records should appear in the transcript distinct from, and subsequent in order to, the rest of the record of the principal suit.

Fourth—The transcript should show for which party to the suit each witness is sworn, and by which party each document or record is offered in evidence.

Fifth—No one document should be copied twice in the transcript.

Sixth—An accurate alphabetical index should be attached to and form part of each transcript, affording reference to particular pages of the same (and with proper designations or words of description) for the several pleadings, processes, and orders in the suit; for the depositions and testimony of each witness by name (and not by general reference to testimony); for the note of evidence; and for each document, giving the latter its correct title, or some sufficient designation showing its nature and character, (and not merely by the letters, marks, or figures indorsed thereon).

Seventh—Provided, that when records of other suits are included in the transcripts, as indicated above in the third requirement, a like index to each of such records should follow the general index.

2. Any neglect or omission to observe this rule strictly, will subject clerks, as aforesaid, to the cost of repairing such neglect or omission.

RULE II.

The party applying for the filing of a transcript of the record in a cause in this Court, must first tender to the clerk his bond, with satisfactory security, in the sum of fifty dollars, for the payment of such fees as may accrue to the clerk, or deposit with the latter, in place of such bond, the sum of twenty dollars.

RULE III.

1. Cases will be docketed in the order of their filing.
2. Pursuant to Acts No. 17, of the laws of 1876, and No. 22, of 1878, the clerk will keep a *Summary Docket*, but will enter causes therein only on the formal application of counsel in writing, stating the facts entitling such causes to a summary trial, and he will so enter them in the order of such application.
3. Whenever it shall be made to appear to the Court that a case has been improperly caused by counsel to be placed upon the *Summary Docket*, the same shall thereupon be transferred to the *Ordinary Docket*, and entered at the foot thereof.

RULE IV.

1. Only counsel engaged in a cause will be allowed to withdraw the record of the same from the clerk's office, and then not until the expiration of the three days allowed by law within which motions to dismiss may be filed.
2. Records shall, in all cases, be receipted for on withdrawal. They should be returned to the office within a reasonable time, and must be so returned on the requisition of the clerk.
3. No record shall be withdrawn from the clerk's office after final decree therein made has become executory, except upon written application to the Court therefor, and the order of the Court made thereon.
4. Whenever the transcript of appeal, which has been filed in the clerk's office of this Court, is lost, mislaid, or has been removed from that office, either party to said appeal may supply its place by another transcript, which shall be considered as filed of the same date as the filing of the lost, mislaid, or removed transcript: and any cause in which such substituted transcript shall be filed, will be heard in its regular place on the calendar, notwithstanding the absence of the transcript first filed in this Court.

RULE V.

Court will be held every day of each alternate week of the session.

RULE VI.

1. On Monday of each court week cases will be called and fixed for the next court week:—three for Monday, and eight for every other day; provided however, if there be causes entitled to a place on the

Summary Docket, fifteen of them shall be called and fixed for Tuesday, and the same number (if there be so many) shall be fixed for each succeeding day, until the Summary causes are exhausted. These cases shall be properly posted by the clerk, by eleven o'clock of the next day, which shall be notice to all parties. (This portion of the rule will not apply in country terms, during the pendency of which cases will be called and tried continuously, in the order in which they are filed).

2. Before the calling of cases, opportunity will be given counsel to have any cause entitled to preference, but not to entry in the Summary Docket, made subject, on motion, to be called and fixed for trial.

3. All cases which have not been submitted to the Court, after having been twice duly called for trial, shall be removed from the docket and placed upon a docket to be called the *Delay Docket*, and shall not be again put upon the Trial Docket, except on motion and leave granted thereon.

RULE VII.

1. Within six days after any cause shall be fixed for trial, the appellant shall file with the clerk a printed brief or abstract of the cause, containing the substance of all the material pleadings, facts, and documents (referring particularly to the pages of the record where they may be found), and an accurate reference to the points of law and authorities upon which he relies. Ten copies thereof to be furnished and filed with the clerk; one for the opposite counsel, and the remainder for the use of the Court.

2. Within twelve days after the fixing of a cause, the appellee shall also file ten copies of a similar brief, embodying the requirements set forth in regard to the appellant.

3. No cause shall be heard unless one at least of the parties has complied with the foregoing sections of this rule, and if neither party has so complied, the case shall be continued and go to the foot of the docket. If only one party has complied, he may argue or submit the cause, or may decline to do either, in which last event the case shall be continued and go to the foot of the docket, and it is made the duty of the clerk to inform the Court on this point when a case is called for trial.

4. If appellant has filed a brief *before* the day fixed for hearing the cause, but not within six days after it was fixed for hearing, and the appellee has not filed a brief at the time the cause is called for trial, then the appellant may submit the case, and the appellee may be allowed five days to file his brief, but the case shall not be orally argued. If the appellant shall not have filed any brief before the day fixed for the hearing of the cause, and the appellee has filed his brief before the opening of the Court on that day, the latter may argue or submit the cause, or not as he shall prefer, and appellant shall not in that case be

permitted to argue orally the cause, if the appellee does not, nor shall he have time to file a brief.

5. The clerk shall receive no brief in a cause, after it is submitted, unless accompanied by a certificate in writing from counsel that he has delivered a copy to the opposite counsel, with the date of such delivery, or by a written acknowledgment or waiver of such delivery signed by opposite counsel, who shall have, upon application to the Court, a reasonable time from the date of such delivery or waiver in which to reply; and in such cases ten copies must be filed by each party as prescribed in the first section of the rule.

6. All briefs in a cause must be filed in the clerk's office, and before the opening of Court on the day upon which the cause is fixed for trial.

RULE VIII.

1. The original plaintiff in the lower court shall have the right of opening and closing the argument of the cause in this Court.

2. Not more than one hour will be allowed to the counsel for each side, except where in special cases the Court, on application made before the opening argument is begun, may otherwise order. The time not consumed by one counsel will be allowed to another on the same side.

RULE IX.

1. Applications for rehearing must be by petition filed within the legal delay, and must be accompanied by a printed statement of all the points and authorities on which the party founds his application. Additional time for elaborating the argument on such points and authorities may be granted upon a proper showing, if made before the delay expires.

2. When a petition for rehearing in any cause is filed, the clerk will immediately enter it, with its date, in the docket kept for the purpose, and place the record with the decision and five copies of the petition in the consultation room.

3. When a rehearing is granted the cause will be immediately called and fixed with preference, and briefs will be required, as in the first and second sections of Rule VII.

Oral argument may be granted, in the discretion of the Court, if applied for on motion, and four days notice thereof be given to the opposite counsel.

The clerk will properly designate the cause on the Judges' docket as being upon rehearing, and also the fact when oral argument is to be heard.

4. Only one rehearing in any cause will be granted.

RULE X.

1. Motions for dismissal of appeals shall be filed and fixed for trial by the clerk in his office. They shall be so fixed for Monday of each

court week, at least one week's previous notice being given by posting, as prescribed in the first section of Rule VI.; but if not tried on the day for which they are thus fixed, they shall be continued to Monday of the next court week.

2. Such motions shall set forth distinctly all the grounds relied on, and on their trial shall be argued only in printed briefs, which must conform in character and number to the requirements stated in sections first and second of Rule VII.

RULE XI.

1. All motions made in open Court must be offered before the regular business of the Court is begun or after it is closed.

2. No motion will be entertained unless it is in writing, upon not less than a half-sheet of paper, and with a proper title indorsed upon it.

3. All instructions to the clerk and agreements of counsel, on which the Court is to act, must be in writing and duly filed.

RULE XII.

1. The Court will entertain no application for a writ of prohibition, unless previous notice of intention to make such application shall have been given to the opposite party.

2. Hereafter all writs of *mandamus* and prohibition, and rules to show cause, shall be fixed and submitted on printed briefs, and without oral argument.

RULE XIII.

Whenever, pending an appeal, either party shall die, his proper representatives may voluntarily come in and be admitted parties to the suit, and thereupon the cause shall be heard and determined as in other cases. When the appellant dies, pending the appeal, if his proper representatives be known, and reside within the State, and have not made themselves parties to the case, the appellee may on affidavit apply for an order to summon them to appear within twenty-five days; and in default of such appearance, after due return of service, the appellee may move the dismissal of the appeal, or have the cause heard and determined as in other cases.

If the proper representatives of the appellant be not known, or do not reside within the State, the appellee may, on affidavit, obtain an order, that unless they appear and become parties within three months from publication, the appeal will be dismissed. The appellee must cause the said order to be published three times in a newspaper, printed at the seat of government of the State, or in the place where the Court sits, and upon proof of such publication and in default of appearance, the appellee may have the appeal dismissed, or the cause heard and determined, as in other cases.

If the appellee dies pending the appeal, and his proper representa-

tives be known and reside within the State, and have not made themselves parties to the cause, the appellant may, on affidavit, apply for an order to summon them to appear within twenty-five days, and in default of such appearance, after due return of service, the appellant may proceed to have the cause heard and determined, as in other cases.

If the appellee's proper representatives be not known, or do not reside in the State, the appellant may, on affidavit, obtain an order that unless they appear and become parties within three months from publication, the appellant will proceed to have the cause heard and determined, and cause the said order to be published three times in a newspaper, printed at the seat of government of the State, or in the place where the Court sits, and upon proof of such publication, and in default of appearance, the appellant may proceed to have the cause heard and determined, as in other cases.

In country cases the time of personal summonses may be reduced, on special application, according to circumstances.

RULE XIV.

No person applying for admission as an attorney and counselor-at-law shall be examined as such, until his name as a candidate for admission shall have been, by the clerk, published during three judicial days, at the foot of the trial list, posted at the court-room door. Application to be made through the clerk.

The Court will hereafter require of candidates for admission to the bar:

First—Evidence of citizenship of the State of Louisiana.

Second—Evidence of good moral character, by certificates, in conformity to the statutes of March 29, 1823, and March 20, 1842, and of two years study, according to act of May 7, 1877.

The Court will not be satisfied with the qualification of a candidate in point of legal learning, unless it shall appear by examination that he is well read in the following course of studies, at least: Story on the Constitution; Vattel's Law of Nations, or Wheaton's Elements of International Law; the Louisiana Civil Code; the Code of Practice; the Statutes of the State of a General Nature; the Institutes of Justinian; Domat's Civil Law; Pothier's Treatise on Obligations; Blackstone's Commentaries, Fourth Book; Kent's Commentaries; Smith on Mercantile Law; Story or Parsons on Notes; Chitty or Bayley on Bills; Greenleaf, Starkie, or Phillips on Evidence; Russell on Crimes; and the Jurisprudence of Louisiana, as settled by the decisions of the Supreme Court.

The examination shall be conducted in the following manner: At the beginning of the session in New Orleans, the Court will appoint from among the members of the bar, a committee of seven, who are earnestly requested to lend their aid to the Court. Upon the candidate producing

a certificate from the committee that he has been examined by them upon the above works, and that he is, in their opinion, qualified for admission to the bar, the Court will admit him to a public examination, and if, after such public examination, they concur with the committee in opinion, the candidate will be admitted and licensed as an attorney and counselor-at-law, and not otherwise.

The committee will meet twice in each month, during the sessions of the Supreme Court, to wit: on the Friday preceding each court week.

The Court will examine on Tuesday of each court week.

Each candidate to be examined separately before the committee and the Court.

The foregoing rules will be relaxed in the country districts when necessary for the proper dispatch of business, or when their rigid enforcement, in the short time the Court sits in those districts would work injury, or a protracted delay.

AMENDMENT TO RULES.

Adopted November 3, 1879.

Applicants for admission to the Bar, who have been examined by either of the Examining Committees of the city or country Terms of this Court, and who have not been recommended for license, will not be re-examined by either of the committees, nor by the Court, until after six months of additional study.

The several Examining Committees will be requested to furnish the Court hereafter with a list of those applicants who have been examined by them, and have not been recommended for admission.

ERRATA.

Page 427. "The mand Lanier" should be "them and Lanier."

Page 475. "Eight hundred and forty-two dollars" should be "eight hundred and sixteen thousand five hundred and forty-two dollars."

Page 486. "Strey's Code Nap." should be "Sirey's Code Nap."

Page 492. "Steerman" should be "Shearman."

The case of Dejean vs. Hebert, etc., p. 729, reported as having been decided at Opelousas, was never finally decided. The opinions in the case were read at the 1877 term, and a rehearing was granted. In 1878, on rehearing one of the members of the court being absent, the court was equally divided, and the case went over to the term of 1879, when another member of the court being absent, and the court again equally divided, no decision was reached, and the case was compromised.

Substitute *feast* for "first," on page 576 in line 15 from the bottom.

TABLE OF CASES REPORTED.

	PAGE.		PAGE.
Abrams & Co. vs. Union National Bank.....	61	Bowman et al. vs. Kaufman, Sheriff, et al.....	193
Adam et al., State vs.....	717	Britton & Moore vs. Bush....	264
Alter vs. O'Brien.....	452	Brookshier, Tax Collector, et al., Police Jury of Vermillion Parish vs.....	736
Alter, Metcalf, vs.....	389	Buddecke vs. Buddecke et al..	572
Augé vs. Variol.....	865	Burton, Perry vs.....	262
Avery, State vs.....	181	Burton, Sheriff, Montgomery & Deloney vs.....	330
Babin, Administrator, vs. Delahoussaye.....	725	Burthe, Tutrix, vs. Denis, Executor.....	568
Bacas vs. Hernandez et al....	85	Bush, Britton & Moore vs....	264
Barrow, State vs.....	691	Butler et al., Johnson et al. vs.	771
Barry vs. Garnier.....	831	Byrne vs. Hibernia National Bank.....	81
Bartlett vs. Wheeler.....	540	Cambre vs. Grabert et al....	533
Bayhi, Lanata vs.....	229	Carroll, State vs.....	860
Becker, City of New Orleans vs Belloq, Charpoux and Valette vs.....	644	Case, Receiver, Henderson vs.	215
Belloq vs. City of New Orleans	471	Cestac vs. Florane.....	493
Belot et al., Testart vs.....	795	Chaffe & Sons vs. Heyner....	594
Berens vs. Ex'tors of Boutté.	112	Chapman, Executrix, vs. Citizens' Bank of Louisiana....	395
Bess, State vs.....	191	Chapman, Executrix, vs. Nelson et al.....	341
Beynet et al., Maumus vs.....	462	Chopin vs. Clark.....	846
Bird, State vs.....	419	Clafin & Co. vs. Lisso & Scheen	171
Black vs. Good Intent Tow-Boat Company.....	497	Clark, Chopin vs.....	846
Blanc et al., De St. Romes vs.	48	Charpoux and Valette vs. Belloq.....	164
Block, Britton & Co., Vickers vs Board of Assessors, New Orleans Gas Light Co. vs.....	672	Citizens' Bank of Louisiana, Chapman, Executrix, vs....	395
Board of Assessors, N. O. Gas Light Company vs.....	270	Citizens' Bank vs. Wiltz.....	244
Board of Assessors, State ex rel Canton vs.....	475	Citizens' Savings Bank, State vs.....	836
Board of Assessors, St. Charles Street Railroad Co. vs.....	806	City of New Orleans vs. Becker	644
Board of Trustees of New Iberia vs. Serrett.....	852	City of New Orleans, Belloq vs.....	471
Board of Liquidation, State ex rel. Bartlette vs.....	719	City of New Orleans et al., Elder vs.....	500
Board of Liquidation, Sterry vs.....	273	City of New Orleans, Goldsmith vs.....	646
Board Liquidation, Sun Mutual Insurance Company vs..	46	City of New Orleans vs. Hermann.....	529
Board of School Directors of Concordia Parish vs. Hernandez.....	175	City of New Orleans, Jefferson and Lake Pontchartrain R. R. Company vs.....	478
Boisse and Husband vs. Dickson et al.....	158	City of New Orleans vs. Louisiana Savings Bank and Safe Deposit Company.....	637
Boitreaux, State vs.....	741	City of New Orleans, La. Cotton Manufacturing Co. vs..	440
Bothick vs. Society Temine Dereche.....	188		
Bott, State vs.....	63		
	663		

	PAGE.		PAGE.
City of New Orleans vs. St. Anna's Asylum	292	Dup��rier vs. Police Jury of Iberia Parish	709
City of New Orleans vs. Metropolitan Loan Savings and Pledge Bank	310	Dupr�� and Husband vs. Soye et al.	450
City of New Orleans vs. Rhenish Westphalian Lloyds et al. . .	781	Dupuy et al., Louisiana Board Trustees American Printing House for the Blind vs.	305
City of New Orleans vs. Louisiana Savings Bank and Safe Deposit Company	826	Durel et al. vs. Tennison.	538
City of New Orleans, Walker et al. vs.	828	Duvie, Lacoste vs.	367
City of New Orleans vs. the Southern Bank	560	Elder vs. City of New Orleans et al.	500
City of New Orleans vs. Waggaman	299	Elliott, Mrs., Administratrix, Succession of Elliott,	31
City of New Orleans vs. Wilmot, Agent.	65	Executors of Boutt��, Berens vs.	112
Civil Sheriff of Orleans Parish, State ex rel. Wung Shung vs.	799	Factors' and Traders' Insurance Co. vs. DeBlanc et al. .	100
Cole, Yale & Bowling vs.	687	Factors' and Traders' Insurance Co. vs. Marine Dry Dock and Shipyard Company	149
Cole vs. La Chambre et al.	41	Fairchild vs. McEnery et al. .	695
Cole vs. Randolph.	535	Farrar vs. Steele.	640
Couerge et al., Lannes et al. vs.	74	Fazende vs. Morgan.	549
Cousin et al., vs. State ex rel. School Board, parish of St. Tammany vs.	297	Feray, Succession of.	727
Cronan et al., Howell et al. vs.	247	Fifth Regular Baptist Church, White vs.	521
Daniel, State vs.	91	Fields, Tutrix, vs. Gagn�� and Wife.	182
Darcy & Wheeler vs. Labennes and Wife	404	Finn, State vs.	408
Davis, State vs.	249	Florane, Cestac vs.	493
Dejean vs. Hebert et al.	729	Fox et al. vs. McKee	67
Deblieux & Co. vs. Hotard.	194	Frank, Agent, Washburn, Administrator vs.	427
DeBlanc et al., Factors' and Traders' Insurance Co. vs. .	100	Francineues et al., Henri vs. .	856
Dee et al., Linn vs.	217	Frappart, State vs.	340
Delahoussaye, Babin, Administrator, vs.	725	Frellsen, Hood vs.	577
Denis, Ex., Burthe, Tutrix vs. .	568	Freret vs. Heirs of Freret.	506
Dennison alias Denis, State vs.	847	Friedlander vs. Slaughter House Company	523
Depass and Baptiste, State vs.	487	Gagn�� and Wife, Fields, Tutrix vs.	182
Destrehan vs. Police Jury Parish of Jefferson	179	Garc��a y Leon vs. Louisiana Mutual Insurance Company.	546
De St. Rom��s vs. Levee Steam Cotton Press Company	224	Gardiner vs. Succession of Scherer.	527
De St. Rom��s vs. Blanc et al. .	48	Garnier, Barry vs.	831
Dickson et al., Boisse and Husband vs.	741	Gay vs. N. O. Pacific Railway Company	274
Dinkgrave, Succession of.	703	Gay, Tutor, N. O. Pacific Railway Co. vs.	430
Dobbins, Shelly vs.	530	Germaine, Tutrix, vs. Mallerich	371
Drumm, Ex., et al. vs. Kleinman	124	Gerodias vs. Handy, Sheriff, et al.	334
Drumm, Hanley, Executor, vs.	106	Girardey et al., Wintz vs.	381
Dufour, State vs.	804	Girod, People's Bank vs.	592
Duke, Tax Collector, Walters		Gisch, State vs.	544
Dundas, Thomas vs.	184		
vs.	668		

TABLE OF CASES REPORTED.

xvii

	PAGE.		PAGE.
Goldsmith vs. City of New Orleans.....	646	Interdiction of Watson.....	757
Gollain, Succession of, vs.....	173	In the matter of the Minor Fortier.....	50
Good Intent Tow-Boat Company, Black vs.....	497	Jack, Reine vs.....	859
Goodrich vs. Hunton.....	582	Jackson & Manson vs. Hoffman et al.....	97
Gordon vs. Knox.....	284	Jacob vs. Preston.....	514
Grabert et al., Cambre vs.....	533	Janney, Heirs of Herriman vs.....	276
Green, Receiver, vs Locke et al.....	656	Jefferson and Lake Pontchartrain R. R. Company vs. the City of New Orleans.....	478
Grivot vs. La. State Bank.....	467	Jennings et al. vs. Vickers et al.....	679
Guilbeau, Administrator, Marais, Syndic, vs.....	713	Johnson et al. vs. Butler et al.....	770
Hall & Lisle vs. Wyche.....	734	Johnson, State vs.....	368
Hammett vs. Sprowl et al.....	325	Johnson, State vs.....	482
Hammond vs. Lesseps et al.....	337	Johnson vs. Weinstock.....	698
Handy, Sheriff, et al., Gerodias vs.....	334	Judge of the Third District Court, State ex rel. L. E. & E. F. Herwig vs.....	800
Handy, Sheriff, et al. O'Keefe vs.....	832	Judge of Sixth District Court, State ex rel. Becker vs.....	850
Hanley, Executor, vs. Drumm.....	106	Judge of the Fifth District Court, State ex rel. Morey vs.....	823
Hardie vs. Turner, Wilson & Co.....	469	Judge Parish Court of Ouachita, State ex rel. Farmer vs.....	116
Hart, Sheriff, Mullin & McGowen vs.....	677	Judge of Sixteenth District, State ex rel. Fontelieu vs.....	47
Harvey vs. Nelson, Lanphier & Co. and Short.....	434	Judge Sixth Judicial District, State ex rel. Ogden, Attorney General vs.....	557
Hayes et al., Powell vs.....	789	Judge of the Third District Court, State ex rel. Widow Merz et al. vs.....	120
Hebert, Administrator, vs. Lefevre et al.....	363	Jumel, Auditor, State ex rel. Moss vs.....	142
Hebert et al, Dejean vs.....	729		
Hebrew Congregation, State ex rel. Soares vs.....	205	Kaufman, Sheriff, et al., Bowman et al. vs.....	193
Heirs of Freret, Freret vs.....	506	Kelly et al., McIntosh, tutor, vs.....	649
Heirs of Herriman vs. Janney.....	276	King, State vs.....	179
Henderson, Trustee, vs. Case, Receiver.....	215	Kirwin et al. vs. Hibernia Insurance Co.....	339
Henry, Succession of.....	555	Kleinman, Drumm, Ex., et al. vs.....	124
Henry Tête, Louis Desobry vs.....	809	Knox, Gordon vs.....	284
Henri vs. Francinques et al.....	856	Knight vs. Ragan.....	289
Hermann, City of New Orleans vs.....	529	Labauve vs. Slack, Executor.....	134
Hernandez, Board of School Directors of Concordia Parish vs.....	158	Labennes and Wife, Darcy & Wheeler vs.....	404
Hernandez et al., Bacas vs.....	85	Labranche et al., New Orleans Insurance Association vs.....	839
Heyner, Chaffee & Sons vs.....	594	La. Board Trustees American Printing House for the Blind vs. Dupuy et al.....	305
Hibernia Insurance Company, Kirwin et al., vs.....	339	La Chambre et al., Cole vs.....	41
Hibernia Na'nal Bank, Byrne vs.....	81	Lacoste vs. Duvie.....	367
Hoffman et al., Jackson & Manson vs.....	97		
Hood vs. Frellsen.....	577		
Hotard, Deblieux & Co. vs.....	194		
Howell et al. vs. Cronan et al.....	247		
Hunton, Goodrich vs.....	582		
Imboden et al., Renshaw, Cammack & Co. vs.....	661		

	PAGE.		PAGE.
La. Equitable Life Insurance Co., Trager, Tutrix, vs.	235	Metcalf vs. Alter.	389
La. Cotton Manufacturing Co. vs. City of New Orleans.	440	Metropolitan Loan Savings and Pledge Bank, City of New Orleans vs.	310
Laloire vs. Wiltz.	436	Miles, State vs.	825
Lanata vs. Bayhi.	229	Miltenberger vs. Weems Heirs.	259
Lanier et al., State vs.	423	Montgomery & Deloney vs. Burton, Sheriff.	330
Lannes et al. vs. Courege et al.	74	Montgomery vs. Wilson et al.	196
La. State Bank, Grivot vs.	467	Morgan, Fazende vs.	549
Laussade vs. Maury et al.	858	Morrison, State vs.	211
Lawrason, Stirling et al. vs.	169	Mulligan vs. Vallee et al.	375
Law, Succession of.	456	Mullin & McGowen vs. Hart, Sheriff.	677
Lebrew, Succession of.	212	Murray vs. Pontchartrain Railroad Company.	490
Lefevre et al., Hebert, Administrator, et al.	363	Nelson et al., Chapman, Ex., vs.	341
Lesseps et al., Hammond vs.	337	Nelson, Lanphier & Co. and Short, Harvey vs.	434
Levee Steam Cotton Press Co., De St. Romes vs.	224	New Orleans Gas Light Co. vs. Board of Assessors.	270
Linn vs. Dee et al.	217	New Orleans Insurance Association vs. Labranche et al.	839
Linton, Succession of.	130	Nicholson & Co. vs. Succession of Jennings.	328
Louis Desobry vs. Henry Tête Lisso & Scheen, Claflin & Co. vs.	809	Nolan vs. Succession of New.	552
Locke et al., Green, Receiver, vs. Louisiana Levee Company vs. State of Louisiana.	171	Noland, Executrix, vs. Wayne.	401
Louisiana Mutual Insurance Company, Garcia y Leon vs.	656	N. O. City Gas Light Company vs. Board of Assessors.	475
Louisiana Savings Bank and Safe Deposits Company, City of New Orleans vs.	637	N. O. Pacific Railway Co., Gay vs.	274
Louisiana Savings Bank and Safe Deposit Company, City of New Orleans vs.	826	N. O. Pacific Railway Co. vs. Gay, Tutor.	430
Macias, Succession of.	127	O'Brien, Alter vs.	452
Maduel, Executor, et al. vs. Tynes et al.	483	O'Conner vs. Parish of East Baton Rouge.	221
Mallerich, Germaine, Tutrix, vs. Mangham et al., Parmer vs.	371	O'Grady et al., State vs.	378
Maraist, Syndic, vs. Guilbeau Administrator.	348	O'Keefe vs. Handy, Sheriff, et al.	832
Marine Dry Dock and Shipyard Co., Factors' and Traders' Insurance Company vs.	713	Parish of East Baton Rouge, O'Conner vs.	221
Martin, State vs.	149	Parish Judge of St. Bernard, State ex rel. Padron vs.	794
Matehler vs. Bank of Lafayette Matter of Mechanic's Society.	120	Parish Judge of St Landry, State ex rel. Moore vs.	802
Maumus vs. Beynet et al.	627	Parker, Dative Ex., Wisdom vs. Parmer vs. Mangham et al.	52
Maury et al., Laussade vs.	462	Pasley, McConnell vs.	348
McAdam vs. Soria.	858	People's Bank vs. Girod.	532
McConnell vs. Pasley.	862	Perkins, State vs.	592
McElvin et al., Taylor vs.	532	Perry vs. Burton.	192
McEney et al., Fairchild vs.	283	Perry vs. Rue.	262
McIntosh, Tutor, vs. Kelly et al.	695	Phipps vs. Mrs. Ruth Snodgrass.	287
McKee, Fox et al. vs.	649	Pickens vs. Webster, Sheriff, and Schmidt & Zeigler.	88
Mechanics' Society, Matter of.	67		870
Mendelsohn & Newman, Walmsley and Patterson vs.	627		
	125		

TABLE OF CASES REPORTED.

xix

	PAGE.		PAGE.
Pillsbury, Mayor, et al., State ex rel. Southern Bank vs.	1	Southern Bank, City of New Orleans vs.	560
Pipes, Tax Collector, Shields vs.	765	Soye et al., Dupré and Husband vs.	450
Pirtle vs. Price et al.	357	Spearing et al., State ex rel. Redon vs.	122
Police Jury of Iberia Parish, Dupérier vs.	709	Spivey vs. Wilson.	653
Police Jury Parish of Jefferson, Destrehan vs.	179	Sprowl et al., Hammett vs.	325
Police Jury of Vermilion Parish vs. Brookshier, Tax Collector, et al.	736	State ex rel. Bartlette vs. Board of Liquidation.	273
Pontchartrain Railroad Company, Murray vs.	490	State ex rel. Becker vs. Judge Sixth District Court.	850
Populus, Sabalot vs.	854	State ex rel. Farmer vs. Judge Parish Court of Ouachita ..	116
Powell vs. Hayes et al.	789	State ex rel. Fairchild vs. Stillman.	162
President of Bank of Supervisors, etc., State ex rel Schorten, Agent, vs.	711	State ex rel. Fontelleu et al. vs. Judge of Sixteenth District.	47
Preston, Jacob vs.	514	State ex rel. Schorten, Agent, vs. President of Bank of Supervisors, etc.	711
Price et al., Pirtle vs.	357	State ex rel. Moss vs. Jumel, Auditor	142
Pritchard, State vs.	209	State ex rel. School Board, parish St. Tammany, vs. Cousin et al.	297
Ragan, Knight vs.	289	State ex rel. Soares vs. Hebrew Congregation.	205
Randolph, Cole vs.	535	State ex rel. Ogden, Attorney General, vs. Judge Sixth Judicial trict District.	557
Reine vs. Jack.	859	State ex rel. Padron vs. Parish Judge of St. Bernard.	794
Renshaw, Cammack & Co. vs Imboden et al.	661	State ex rel. Wung Chung vs. Civil Sheriff of Orleans Parish	799
Revells, State vs.	387	State ex rel. L. E. & E. F. Herwig vs. Judge of the Third District Court.	800
Rhea, Succession of.	323	State ex rel. Moore vs. Parish Judge of St Landry.	802
Rhenish Westphalian Lloyds et al., City of New Orleans vs.	781	State vs. Dufour.	804
Richardson, Sheriff, et al., Williamson vs.	685	State ex rel. Canton vs. Board of Assessors.	806
Robacker, State vs.	651	State ex. rel. Morey vs. Judge of the Fifth District Court.	823
Romero, Succession of.	721	State ex rel. Redon vs. Spearing et al.	122
Roth, Succession of.	315	State ex rel. Southern Bank vs. Pillsbury, Mayor, et al.	1
Rue, Perry vs.	287	State ex rel. Widow Merz et al. vs. Judge of the Third District Court.	120
Sabalot vs. Populus.	854	State of Louisiana vs. Southern Bank.	519
School Board and Rogers, Trevigne vs.	105	State of Louisiana, Louisiana Levee Company vs.	250
Serret, Board of Trustees of New Iberia vs.	719	State vs. Avery.	181
Sewell vs. Watson.	589	State vs. Adam et al.	717
Shelly vs. Dobbins.	530	State vs. Barrow.	691
Shields vs. Pipes, Tax Collector	765		
Singletary vs. Singletary, Sheriff, et al.	374		
Slack, Executor, Labauve vs.	134		
Slaughter House Company, Friedlander vs.	523		
Smith, State vs.	406		
Snodgrass, Mrs. Ruth, Phipps vs.	88		
Society Temine Dereche, Bothick vs.	63		
Soria, McAdam vs.	862		
Southern Bank, State of Louisiana vs.	519		

	PAGE.		PAGE.
State vs. Bess.....	191	Succession of New, Nolan vs..	552
State vs. Bird.....	419	Succession of Romero.....	721
State vs. Boitreaux.....	188	Succession of Roth.....	315
State vs. Bott.....	6c3	Succession of Rhea.....	323
State vs. Carroll.....	860	Succession of Scherer, Gardi-	
State vs. Citizens' Savings Bank	836	ner vs.....	527
State vs. Daniel.....	91	Succession of Stone.....	311
State vs. Davis.....	249	Succession of Tabary.....	409
State vs. Dennison alias Denis	847	Sun Mutual Insurance Com-	
State vs. Depass and Baptiste	487	pany vs. Board Liquidation.	175
State vs. Finn.....	408	Swan vs. Vogel et al.....	38
State vs. Frappart.....	340	Tabary, Succession of.....	409
State vs. Gisch.....	544	Taylor vs. McElvin et al.....	283
State vs. Johnson.....	482	Taylor, State vs.....	851
State vs. Johnson.....	368	Tennison, Durel et al.....	538
State vs. King.....	179	Testart vs. Belot et al.....	795
State vs. Lanier et al.....	423	Thomas vs. Dundas.....	184
State vs. Martin.....	849	Toby, State vs.....	756
State vs. Miles.....	825	Trager, Tutrix, vs. La. Equita-	
State vs. Morrison.....	211	ble Life Insurance Co.....	235
State vs. O'Grady et al.....	378	Trahan et al., State vs.....	715
State vs. Perkins.....	192	Trevigne vs. School Board and	
State vs. Pritchard.....	209	Rogers.....	105
State vs. Revells.....	387	Turner, Wilson & Co., Hardie	
State vs. Robacker.....	651	vs.....	469
State vs. Smith.....	406	Tuyes et al., Maduel, Executor,	
State vs. St. Geme.....	302	et al.....	483
State vs. Taylor.....	851		
State vs. Trahan et al.....	715	Union National Bank, Abrams	
State vs. Toby.....	756	& Co. vs.....	61
State vs. Vance.....	398		
State vs. Wallman.....	146	Vallee et al., Mulligan vs.....	375
State vs. Watson.....	379	Vance, State vs.....	398
State vs. Womack.....	635	Variol, Augé vs.....	865
State vs. Woods et al.....	267	Vickers vs. Block, Britton & Co	672
St. Anna's Asylum, City of New		Vickers et al., Jennings et al.	
Orleans vs.....	292	vs.....	679
Steele, Farrar vs.....	640	Vogel et al., Swan vs.....	38
St. Geme, State vs.....	302		
Sterry vs. the Board of Liqui-		Waggaman, City of New Or-	
dation.....	46	leans vs.....	299
St. Charles Street Railroad Co.		Walker et al. vs. City of New	
vs. Board of Assessors.....	852	Orleans.....	828
Stillman, State ex rel. Fairchild		Wallace, Jno., <i>in re</i> , praying	
vs.....	162	that the award of Arbitrators	
Stirling et al. vs. Lawrason....	169	be made executory.....	335
Stone, Succession of.....	311	Wallman, State vs.....	146
Succession of Dinkgrave.....	703	Walmsley and Patterson, Ex-	
Succession of Elliott vs. Mrs.		ecutors, vs. Mendelsohn &	
Elliott, Administratrix,	31	Newman.....	152
Succession of Feray.....	727	Walters vs. Duke, Tax Col-	
Succession of Gollain.....	173	lector.....	668
Succession of Henry.....	555	Washburn, Administrator, vs.	
Succession of Jennings, Nichol-		Frank, Agent.....	427
son & Co. vs.....	328	Watson, Interdiction of.....	757
Succession of Law.....	456	Watson, Sewell vs.....	589
Succession of Lebrew.....	212	Watson, State vs.....	379
Succession of Linton.....	130	Wayne, Noland, Executrix, vs.	401
Succession of Macias.....	127	Weems Heirs, Miltenberger vs.	259

TABLE OF CASES REPORTED.

xxi

	PAGE.		PAGE.
Webster, Sheriff and Schmidt		Wilson, Spivey vs.....	653
& Zeigler vs.....	870	Wiltz, Citizens' Bank vs.....	244
Weinstock, Johnson vs.....	698	Wisdom vs. Parker, Dative	
Wheeler, Bartlett vs.....	540	Executor.....	52
White vs. Fifth Regular Bap-		Wiltz, Laloire vs.....	436
tist Church.....	521	Wintz vs. Girardey et al.....	381
Williamson vs. Richardson,		Womack, State vs... ..	635
Sheriff, et al.....	685	Woods et al., State vs.....	267
Wilmot, Agent, City of New		Wyche, Hall & Lisle vs.....	734
Orleans vs.....	65		
Wilson et al., Montgomery vs.	196	Yale & Bowling vs. Cole.....	687

472

LIST OF CASES NOT REPORTED.

NEW ORLEANS.

- Alter, C. E., vs. Board of Liquidation.
Alter, C. E., vs. Brien, J. O.
Ainslie, E. A., vs. Schmidt & Zeigler.
Abelard, J., vs. Edwards, D. & J.
Avery, H., Bowman vs.
Aymes, J. O., Carrian, J. vs.
Atocha, A. A., Gill vs.
Alter, C. E., Metcalfe vs.
Alexander, Rosanna, State vs.
Abadie, Michel, State vs.
Board of Liquidators, New York Guaranty Co. vs.
Board of Liquidation, Boyer vs.
Board of Liquidation, Alter, C. E., vs.
Brien, J. O., Alter, C. E., vs.
Boyer, E. P., vs. Board of Liquidation.
Bringier, A., vs. Roman, E. & J. S.
Bernard, H., vs. Vicknaire, E.
Baird, A. W., vs Love, L. E., et al.
Byrne, Vance & Co. vs. Marshall, G. M.
Burke & Thompson vs. Chaperon, P.
Bidwell, H., vs. Maginnis, A. A.
Bonnaffé vs. Bonnaffé.
Butler, J. vs. Long, H. T.
Bynum, E., vs. Calhoun, W. S.
Blake, E., vs. Kearney, R. A.
Berwin, M., vs. Factors' & Traders' Insurance Co.
Barth, H., vs. Kasa, Mrs. L.
Baldwin, A., vs. Sugar Manufacturing Co.
Bowie, M. J., vs. Weatherby, J. R.
Benjamin, H. W., vs. City of New Orleans.
Bellington Mrs., vs. Sheriff et al.
Bowman, I. W., vs. Avery, H.
Bonvillain, R., vs. Verret, A.
Borland, E. Jr., vs. Lawrence, E.
Burbank, E. W., vs. City of New Orleans.
Benedict, W. S., vs. Guillemen, Mrs.

Bryan, W. A., vs. Lange, V. M.
Bussey & Co. vs. Nelson & Co.
Board of Liquidators, Chambury vs.
Benham, G. C. et al., Dyson, L., vs.
Boisseau, E., Dawson vs.
Berryman, S., Gusman vs. •
Blanchard, M. M, Gay, E. J. & Co., vs.
Burnstein et al., Hyman vs.
Blackman, W. F., Hunter vs.
Barrett, L. H, Killilia, Heirs of, vs.
Bank of Lafayette, Mutchler vs.
Buckner, H. S., Miller vs.
Brown vs. Peterson.
Brandon, Mrs. C. S., Rawlings vs.
Brette, J., State ex rel. School Board vs.
Burke, State ex rel. Houston vs.
Berweyer, M., State vs.
Barrow, D., State vs.
Brennan, Michael, State vs.
Board of Liquidators, Smith vs.
Board of Assessors, St. Charles street R. R. Co. vs.
Bonner, Mrs. A., Sentell & Co. vs.
Bryant, Sheriff, et al., Wilton, Mrs., vs.
Badger, A. S., Hoey vs.
Barba, J. et al., Francisco vs.
Claxton, Remsen & Haffelfinger vs. Eyrich, J. E.
Crescent City L. S. L & S H. Co. vs Guiche, J.
Chambury, R. Y., vs. Board of Liquidators.
Caillouet, T., vs. Caillouet, L. J.
Camors, J. B & Co., vs. People's Insurance Co.
Carran, J., vs. Wallerich, F.
Crichton, Mrs. S. P., vs. Gay, E. J. & Co.
Carran, J, vs. Aymes, J. O.
Carroll, D. R., vs. Petit, J.
Collens, T. W., vs. Dubuclet, A.
Chaperon, P., Burke & Thompson vs.
Calhoun, W. S., Bynum vs.
Croner, W. B., Gutierrez vs.
Cheney, Robert, State vs.
Citizens' Savings Bank, State vs.

-
- Chew & Lawrence, Shelly & Co. vs.
Collins, J. K. & Bro., Tilton vs.
Conway, J. M., Taylor vs.
Calhoun, W. S., Wallace & Handlin vs.
Crescent Mutual Insurance Co. vs. Hunton, Thos.
Conway, J. M., Taylor vs.
Durbridge, W., vs. Smith, J.
Dobard, Mrs. A., vs. Thibaut, Sheriff, et al.
Dyson, L., vs. Benham, G. C., et al.
Dawson, J., vs. Boisseau, E.
Dubuclet, A., Collens vs.
Decuir, F. et al., Loeb vs.
Dufour, H. L., Nalle & Cammack vs.
Decuir, Sheriff, Oliver, Mrs., vs.
Doyle, H., State vs.
Duco, A., Succession of.
Dejan, P., Weysham vs.
Dorville, A., Erath vs.
Eschert, Mrs. T., vs. Harrison, W. C., et al.
Edwards, D. & J., Abelard vs.
Eyrich, J. E., Claxton, R. & H., vs.
Egan, M., Succession of.
Erath, C. G., vs. Dorville, A.
Ford, Mrs. A., vs. Kittredge, Mrs. E. A.
Foreman, O. H., vs. Francis, M.
Field, S., vs. Weaver, D.
Fletcher & Co. vs. Shelby & Co.
Freret, J., vs. Russell, B.
Fernandez, Executor, vs. Morphy, E.
Fulton, J., vs. City of New Orleans.
Factors' and Traders' Insurance Co., Berwin vs.
Francis, M., Foreman vs.
Fellowes, J. Q. A., Hero vs.
Fick, F., Ohse vs.
Fischer, M. & A., Richardson vs.
Ford, Abraham, State vs.
Finnerty, Thomas, State vs.
Florance, U., Schreppe vs.
Francisco, E., vs. Barba, J., et al.
Gusman, A. L., vs. Berryman, S.

-
- Golden, B., vs. Morgan, C.
Gill, T. M., vs. Atocha, A. A.
Gay, E. J. & Co., vs. Blanchard, M. M., et al.
Gillespie, C., vs. Twitchell, M. H.
Gutierrez, Heirs of, vs. Croner, B. W., et al.
Guillemen, Mrs., Benedict vs.
Guiche, J., Crescent City L. S. L. & S. H. Co. vs.
Gay, E. J. & Co., Crichton, Mrs., vs.
Gertoner, A., Lewis vs.
Gallois, F., Martinez vs.
Gourgaut, P., Porte vs.
Ghr, Daniel, Succession of.
Gourgotte, P., Porte vs.
Hasam, T., vs. McVittie, J.
Hyman et al., vs. Burnstein et al.
Heft, P., vs. Kiltz, H.
Hunter, R. A., vs. Blackman, W. F.
Handlin, W. W., vs. N. O. M. & T. R. R. Co.
Hammond, S. W., vs. Ross, P., et al.
Harvey, J. H., vs. Succession of Harper, W. P.
Hero, A., Jr., vs. Fellowes, J. Q. A.
Hamilton, S. & Bros., vs. Wohl, M.
Houston, W. T., vs. Jumel, Auditor.
Harrison, W. C. et al., Eschert vs.
Hermance et al., Lawrence, C. H. & Co., vs.
Handy, Sheriff, Lacoste vs.
Harris, W. H., New Orleans Mechanics' Society vs.
Handy, Sheriff, O'Keefe vs.
Hibernia Insurance Company, O'Hern vs.
Hill, J. D., Roy vs.
Hawkins, Randle, State vs.
Howard, Ed., et al., State vs.
Hession, J., Stover vs.
Hapley, W. C., Scheen vs.
Hibernia National Bank, Wilsey, Mrs., vs.
Hernandez, School Board vs.
Hunton, Thomas, Crescent Mutual Insurance Co. vs.
Hoey, N. J., vs. Badger, A. S.
Husband, Jackson, Mary E., vs.
Hawkins, J., N. O. M. & Building Co. vs.

Irwin, P., Moore vs.
Jumel, Auditor, Houston vs.
Johnson, W. M., Nicaud, Mrs , vs.
Jones, E , Pike, Brother & Co. vs.
Jacobs, H , Ripuiski vs.
Judge, etc., State ex rel. Merz vs.
Judge, etc , State ex rel. Katz vs.
Judge, etc., State ex rel. Bergeron vs.
Judge, etc., State ex rel. Simonds vs.
Judge, etc., State ex rel. Poole, W. L., vs.
Judge, etc., State ex rel. City of New Orleans vs.
Judge, etc., State ex rel. Denegre vs.
Judge, etc., State ex rel. Young vs.
Judge, etc., State ex rel. Hill, J. D., vs.
Judge, etc., State ex rel. Goldsmith vs.
Judge, etc., State ex rel. Y Leon Justo, G., vs.
Judge, etc., State ex rel. Pilcher vs.
Jumel, etc., State ex rel. Weymouth vs.
Jumel, etc., State ex rel. Samuels vs.
Jumel, etc., State ex rel. Nolan vs.
Jumel, etc., State ex rel. Wynn vs.
Jumel, etc., State ex rel. Atkinson vs.
Johnson, Henry, State vs.
Jackson, Mary, E., vs. her husband.
Kine, S. B., vs. Parish of St Helena.
Killilia, Heirs of, vs. Barrett, L. F.
Kasa, Mrs. L., Barth vs.
Kearney, R. A., Blake vs.
Kittredge, Mrs. E. A., Ford, Mrs., vs.
Kiltz, H , Heft vs.
Kouns, G. L., vs. Waggaman, E., et al.
Leon, Y. J. G. , vs. Louisiana Mutual Insurance Co.
Leon, Y. J. G., vs. Louisiana Mutual Insurance Co.
Lawrence, C. H. & Co., vs. Hermance et al.
Lynch, J. H., vs. N. O. Wrecking, etc., Co.
Lewis, J. J , vs. Gertoner, A.
Loeb, A , vs. Decuir, F , et al.
Lumpkin & Eggleston vs. Maxwell & Goodman.
Ley, J., vs. Wallace & Co.
Lehman, Abraham & Co. vs. City of New Orleans.

Love, L. E., vs. Webster, Sheriff, et al.
Louisiana Mutual Insurance Company *in re*.
Lacoste, J., vs. Handy, Sheriff.
Love, L. E. et al., Baird vs. .
2 Long, H. T., Butler vs.
Lawrence, E., Borland vs.
Lange, V. M., Bryan vs.
Louisiana Mutual Insurance Co., Leon vs.
Lont et al., Rains vs.
Leehey, State ex rel. DePoorte vs.
Lusher, State ex rel. Newman, I., vs.
Lockerby, Chas, State vs.
Laresche, J. C., State vs.
Louisiana Levee Co., Southworth vs.
Lyons, L. W., Succession of.
Leeds & Co. et al., Van Norden vs.
Lower Coast Packet Co. vs. Wood, J.
May, G. B., vs. Newman, S. B., & Co.
Moran, P., vs. Wallace & Co.
Mutchler, R., vs. Bank of Lafayette.
Metcalf, A. W., vs. Alter, C. E.
Murray, Mrs. E., vs. Pontchartrain Railroad Co.
Mestier, L., vs. Merchants' Mutual Insurance Co.
Merchants' Mutual Insurance Co., Mestier, L., vs.
Malnoury, J., vs. Pugh, W.
Moore, J. T., & Co., vs. Irwin, P.
Martinez, J., vs. Gallois, F.
Miller, G. F., vs. Buckner, H. S.
Marchand, A., vs. Pickles, J.
Marshall, G. M., Byrne, Vance & Co. vs.
Maginnis, A. A., Bidwell vs.
Morphy, E., Fernandez vs.
Morgan, C., Golden vs.
McVittie, J., Hasam vs.
Maxwell & Goodman, Lumpkin & Eggleston vs.
Merchants' Mutual Insurance Co., Mestier vs.
McCann, D. C., City of New Orleans vs.
Mullen, J., Regal vs.
Monier, Michael, State vs.
McVey, Edward, State vs.

-
- Miller, Richard, State vs.
Mechanics' and Traders' Insurance Co., State vs.
McCaffrey, J., Slawson vs.
New York Guarantee, etc. Co. vs. Board of Liquidators.
Norwalk Iron Works vs. West, B. J.
New Orleans Mechanics' Society vs. Harris, W. H.
Nalle & Cammack vs. Dufour, H. L.
New Orleans, city of, vs. McCann, D. C.
Nicaud, Mrs. E., vs. Johnson, W. M.
New Orleans, city of, vs. Waggaman, E., et al.
New Orleans, city of, vs. Bermudez, E.
Nelson & Co., Bussy & Co. vs.
New Orleans, city of, Benjamin vs.
New Orleans, city of, Burbank vs.
New Orleans, city of, Fulton vs.
N. O. M. & T. R. R. Co., Handlin vs.
New Orleans Wrecking Co., Lynch vs.
New Orleans, city of, Lehman, Abraham & Co. vs.
Newman, S. B. & Co., May vs.
N. O. B. & V. R. R. Co., Pike vs.
New Orleans, city of, Quick vs.
New Orleans, city of, Ranger vs.
New Orleans, city of, Ranger vs.
New Orleans, city of, State ex rel. Daunoy vs.
Nevers, J. L., vs. Succession of Andry, C. V.
Nash, C. T., Parker, executor, vs.
N. O. M. & Building Co. vs. Hawkins, J.
Navra, M. L., Offner, E., vs.
O'Keefe, Widow R., vs. Handy, Sheriff, et al.
Ohse, A., vs. Fick, F.
Oliver, Mrs. F. C., vs. Deenir, Sheriff.
O'Hern, W. P., vs. Hibernia Insurance Co.
Offner, E. vs. Navra, M. L.
Oubre, E., Perry vs.
Porte, J., vs. Gourgant, P.
Pike, Brother & Co, vs. Jones, E.
Pike, W. S., vs. New Orleans, Baton Rouge & Vicksburg R. R. Co.
Proudhomme, Heirs of, vs. Walmsley, T. C.
Perry, C., vs. Oubre, E.
Peterson, W. D., vs. Brown, J. J.

-
- People's Insurance Co., Camors, J. B., vs.
Petit, J., Carroll vs.
Parish of St. Helena, Kine vs.
Pontchartrain Railroad Co., Murray, Mrs., vs.
Pugh, W., Malnouvy vs.
Pickles, J, Marchand vs.
Pickett, Thomas, State vs.
Pike, W. S., Jr., Southern Mutual Insurance Co. vs.
Police Jury, St. Martin vs.
Parker, E. T., Executor, vs. Nash, C. T.
Porte, J., vs. Gourgotte, P.
Prather, J. M., Shawhan vs.
Quick, F. H., vs. City of New Orleans.
Ries vs. Ries.
Regal, F., vs. Mullen, J. B.
Roy, J., vs. Hill, J. D.
Randolph, G. W., vs. Wood, B. D., & Bro.
Rains, A. B. et.al. vs. Lont et al.
Richardson, Mrs. A. R., vs. Fischer, M. & A.
Ruffer Bros. vs. Wohl, M.
Ranger, M., vs. City of New Orleans.
Ranger, M., vs. City of New Orleans.
Riddell, P. G. *In re*.
Rawlings, A. D., vs. Brandon, Mrs. C. S.
Ripuisi, C., vs. Jacobs, H.
Roman, E. & J. S., Bringier vs.
Russell, B, Freret vs.
Ross, P. et al., Hammond vs.
Recorder, etc., State ex rel. Bertin & Labathé vs.
Ricard, Marie., State vs.
Reynolds, W. H, Succession of.
Rous, W. et al., Taylor vs.
State ex rel. Merz, Widow, vs. Judge Sixth District Court.
State ex rel. School Board, etc., vs. Bratte, J.
State ex rel. Weymouth, J. M., vs. Jumel, Auditor.
State ex rel. Katz, G., vs. Judge Fourth District Court.
State ex rel. Bergeron vs. Judge Fourth District Court.
State ex rel. Bertin & Labathé vs. Recorder, etc.
State ex rel. Simonds, Mrs. A. M., vs. Judge Fifth Court.
State ex rel. DePoorter, L., vs. Leche, G., et al.

-
- State ex rel. Poole, W. L., vs. Judge Second Court.
State ex rel. City of New Orleans vs. Judge Sixth Court.
State ex rel. City of New Orleans vs. Judge Sixth Court.
State ex rel. Denegre, A. P., vs. Judge Second Court.
State ex rel. Samuels, M. M., vs. Jumel, Auditor.
State ex rel. Daunoy vs. City of New Orleans.
State ex rel. Young, J., vs. Judge, etc.
State ex rel. Nolan, C., vs. Jumel, Auditor.
State ex rel. Newman, I., vs. Lusher, R. M.
State ex rel. Wynn, T. H., vs. Jumel, Auditor.
State ex rel. Houston, W. T., vs. Burke, Treasurer.
State ex rel. Atkinson, J. J., vs. Jumel, Auditor.
State ex rel. Girardey, C. E., vs. Southern Bank.
State ex rel. Hill, J. D., vs. Judge, etc.
State ex rel. Goldsmith vs. Judge, etc.
State ex rel. Pilcher, A. M., vs. Judge, etc.
State ex. rel. Y. Leon, Justo G., vs. Judge, etc.
State vs. Berweyer, M.
State vs. Townsend, Alfred.
State vs. Lockerby, Charles.
State vs. Monier, Michael.
State vs. McVey, Edward.
State vs. Miller, Richard.
State vs. Brennan, Michael.
State vs. Alexander, Rosanna.
State vs. Hawkins, Randle.
State vs. Succession of De Circe.
State vs. Pickett, Thos.
State vs. Howard, Ed., et al.
State vs. Mechanics' & Traders' Insurance Co.
State vs. Barrow, D. N.
State vs. Laresche, J. L.
State vs. Berkery, Ben.
State vs. Taylor, Thos.
State vs. Abadie, Michel.
State vs. Ford, Abraham.
State vs. Johnson, Henry.
State vs. Finnerty, Thos.
State vs. Ricard, Marie.
State vs. Ricard, Marie.

State vs. Vantmeller, Joseph.
State vs. Williams, Wm.
State vs. Scott, W. H.
State vs. Cheney, Robt.
State vs. Doyle, H.
State vs. Citizens' Savings Bank.
Southern Mutual Insurance Co. vs. Pike, W. S., Jr.
Shelly, M. & Co., vs. Thode, P. H.
Southworth, M. A., vs. Louisiana Levee Co.
St. Martin, N., vs. Police Jury, etc.
Smith, S., vs. Board of Liquidators.
Stover, W. D., vs. Hession, J.
St. Charles street Railroad Co. vs. Board of Assessors.
Schreppe, J., vs. Florance, U.
Sentell, W. G. & Co., vs. Bonner, Mrs. A.
Stone, H. L., vs. Succession of Roberts.
Scheen, J. H., vs. Hapley, W. C.
Shelly & Co. vs Chew & Lawrance.
Succession of Egan, Michael.
Succession of Gehr, Daniel.
Succession of Reynolds, W. H.
Succession of Lyons, L. W.
Schmidt & Ziegler, Ainslie, E. A., vs.
Sugar Manufacturing, etc., Co., Baldwin vs.
Sheriff, etc., Bellington, Mrs., vs.
Smith, J., Durbridge vs.
Shelly & Co., Fletcher & Co. vs.
Succession of Harper, W. P., Harvey vs.
Southern Bank, State ex rel. Girardey, vs.
Succession of De Circe, State vs.
Scott, W. H., State vs.
Succession of Roberts, Stone vs.
School Board of Avoyelles vs. Hernandez.
Succession of Armand Duco.
Flawson, A. L., vs. McCaffrey, John, et al.
Succession of Andry, C. V., Nevers vs.
Shawhan, J. N., vs. Prather, J. N.
Tilton, F. W., vs. Collins, J. K., & Bro.
Tilton, F. W., vs. Collins, J. K., & Bro.
Taylor, R. Y., vs. Conway, J. M.

Taylor, L. M., vs. Rous, W., et al.
 Thibaut, Sheriff, Dobard, Mrs., vs.
 Twitchell, M. H., Gillespie vs.
 4 Townsend, A., State vs.
 Taylor, Thos., State vs.
 Thode, P. H., Shelly & Co. vs.
 Taylor, R. G., vs. Conway, J. M.
 Van Norden, W., vs. Leeds & Co. et al.
 Vicknaire, E., Bernard vs.
 Verret, A., Bonvillain vs.
 Witherell, Mrs. C., vs. Witherell, W. H. H.
 Wallace & Handlin vs. Calhoun, W. S.
 Wilton, Mrs. E. P., vs. Bryant, Sheriff, et al.
 Wilsey, Mrs. E., vs. Hibernia National Bank.
 Weatherby, J. R., Bowie vs.
 Wallerich, F., Carran vs.
 Weaver, D., Field vs.
 Wohl, M., Hamilton, S., & Bros., vs.
 Wallace & Co., Ley vs.
 Webster, Sheriff, Love vs.
 Wallace & Co., Moran vs.
 West, B. J., Norwalk Iron Works vs.
 Walmesley, T. C., Prondhomme, Heirs of, vs.
 Wood, D. B. & Bro., Randolph vs.
 Wohl, M., Ruffer vs.
 Williams, Wm., State vs.
 Weysham, Mr. & Mrs., vs. Dejan, P.
 Waggaman, E., Kouns vs.
 Wood, J., Lower Coast Packet Co. vs.

OPELOUSAS.

Anderson, T. C., Burbridge vs.
 Avery, Robt., State vs.
 Avery, Daniel, State vs.
 Adam, E., State vs.
 Burbridge, J. W., vs. Anderson, T. C.
 Burbridge, J. W., vs. Anderson, T. C.
 Bird, N., Lambert vs.
 Cormier, O., vs. Wiltz, M.
 Coats, J., State vs.

Deehon, A., vs. Maignaud, V.
Delahoussaye, O., vs. Fournet & Co.
Fournet & Co., Delahoussaye vs.
Foreman, C. W., Keough vs.
Field, Jean, State vs.
Guenniere, C., Maraist vs.
Gorham, G. W., Succession of.
Garriques, A., Villaseca vs.
Hopkins, H., et al., Smith vs.
Hopkins, H., et al., Smith vs.
Harris, G. R., Webber vs.
Keough, M., vs. Foreman, C. W.
Kavanaugh, M. D., vs. Payne, J. U.
Lambert, E., vs. Bird, N.
Maraist, A., vs. Guenniere, C.
Maignaud, V., Deehon vs.
Payne, J. U., Kavanaugh vs.
Police Jury, etc., State ex rel. Nelson vs.
Robertson, Robt., State vs.
Smith, L. J., vs. Hopkins, H., et al.
State vs. Avery, Daniel.
State vs. Avery, Robert.
State vs. Adam, E.
State vs. Coats, Joseph, et al.
State vs. Field, Jean.
State vs. Robertson, Robt.
State vs. Thibodaux, Eugene.
State ex rel. Nelson, T. W., vs. Police Jury, etc.
Succession of Gorham, G. W.
Thibodaux, Eugene, State vs.
Villaseca, M., vs. Garriques, A.
Webber, O., vs. Harris, G. R.
Wiltz, M., Cormier vs.

MONROE.

Bailey, E. F. vs. Ward, D.
Baker, W. J. D., vs. Richardson, Sheriff.
Batte, Mrs. M. A. E., vs. Moore, Sheriff, et al.
Bishop, J. Robbins, vs.
Broughton, H. Wilkinson, vs.

-
- Crescent Mutual Insurance Co. vs. Payne & Williams.
Citizens' Bank vs. Downs, et als.
Cohen, M. Howell, vs.
Collens, Sheriff, Levy vs.
Campbell, A., Monroe, Mayor of vs.
Cole, J. F., Meyer, Weis & Co. vs.
Campbell, J. N. Phelps vs.
Downs, et al., Citizens' Bank vs.
Grayson, D. W., Executor, vs. Norton, E. E.
Godfrey, Mrs. C. Hoffman & Co. vs.
Gray, L. F., Succession of.
Hoffman & Co. vs. Godfrey, Mrs. C., et al.
Huey, S. C., vs. Huey, J.
Howell, R. H., vs. Cohen, M.
Jurey & Gillis vs. Williamson, W. C.
Johnson, D. LaBaum vs.
Judge, etc., State ex rel. Guson vs.
Judge, etc., State ex rel. Jeter vs.
LaBaum, H., vs. Johnson, D.
Levy, A., vs. Collins, Sheriff.
Liddell, Sheriff, Morgan vs.
Monroe, Mayor of, vs. Richmond et al.
Monroe, Mayor of, vs. Campbell, A.
McLean, Mrs. W. J., vs. Pargoud, J. F.
Meyer, Weis & Co. vs. Cole, J. F.
Morgan, D. C., vs. Liddell, Sheriff.
Moore, Sheriff, Batte, Mrs. vs.
McCraw, N. F., Succession of.
Norton, E. E., Grayson vs.
Phelps, Jno. T., vs. Campbell, J., et al.
Patterson, J. W., vs. Yonque, H.
Payne & Williams, Crescent Mutual Insurance Co. vs.
Pargoud, J. F., McLean, Mrs. vs.
Post, J. T., et al, Ramsey vs.
Robbins, J. B, vs. Bishop, J.
Ramsey, S. W., vs. Post, J. T., et al.
Richardson, Sheriff, Baker vs.
Richmond et al., Monroe, Mayor of vs.
Ryan, P. M., Stafford vs.
Richmond, W. L., Todd vs.

Stirling, E. A., vs. Stirling, J. T., Heirs of.
Succession of Weeks, Jas. C.
Succession of McCraw, N. F.
Succession of Gray, L. F.
State ex rel. Guson, Mrs., vs. Judge, etc.
State ex rel. Jeter, Mrs., vs. Judge, etc.
State vs. Waters, Thos., et al.
Snider, E., vs. Smith, M. C.
Smith, M. C., Snider vs.
Stafford, J. D. C., vs. Ryan, P. M.
Todd, R. B., vs. Richmond, W. L.
Wilkinson, R., vs. Broughton, H.
Ward, D., Bailey vs.
Williamson, W. C., Jurey & Gillis vs.
Weeks, Jas. C., Succession of.
Waters, Thos., et al., State vs.
Yonque, H., Patterson vs.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF LOUISIANA,
AT
NEW ORLEANS.

JANUARY, 1879.

JUDGES OF THE COURT:

HON. T. C. MANNING, *Chief Justice.*

HON. R. H. MARR, HON. A. DEBLANC, HON. W. B. SPENCER, HON. E. D. WHITE,	}	<i>Associate Justices.</i>
--	---	----------------------------

No. 7157.

STATE EX REL. SOUTHERN BANK VS. PILSBURY, MAYOR, ET AL.

Any third person having an interest in the success of the relator or respondent in a mandamus suit, or an interest opposed to both, may intervene in the suit.

A supplemental answer, not in conflict with the original answer, and which does not retard the trial, or require any other or different proof than that required by the original answer, is receivable.

The judgment rendered in a previous suit between the same parties has not the force of *res adjudicata* when the matter at issue in the previous suit was different.

The title of the act of the Legislature No. 71 of the year 1852, in virtue of section 37 of which the bonds of the city of New Orleans, known as the consolidated bonds, were issued, sufficiently indicates the purpose of the act.

The taxes imposed by section 37 of that act on real estate and slaves to meet the annual interest on the consolidated bonds of the city, and provide a sinking fund for their redemption, are not equal and uniform, and hence are unconstitutional.

Article 127 of the constitution of 1845, requiring that taxation shall be equal and uniform, applies as well to municipal as to State taxes.

One Legislature can not impose restrictions on the powers of a municipal corporation which a future Legislature can not modify or abrogate, except where a vested right, or the obligation of a contract might be thereby divested or impaired.

State ex rel. Southern Bank vs. Pilsbury, Mayor, et al.

The holders of the consolidated bonds of the city of New Orleans can not compel the city government to levy a tax on one species of property exclusively for their benefit.

Section 37 of the act of 1852, imposing the special tax on real estate and slaves, did not form a part of the contract between the city of New Orleans and the holders of her consolidated bonds. The forms of legal remedies in force at the date of a contract make no part of the contract.

A PPEAL from the Third District Court, parish of Orleans. *Monroe, J.*

Edward Bermudez and John A. Campbell for plaintiff and appellee.

B. F. Jonas, City Attorney, and Henry C. Miller for defendant and appellant.

John & W. S. Finney, Kennard, Howe & Prentiss, and Thomas J. Semmes for intervenors and appellant.

The opinion of the court was delivered by

MARR, J. The city of New Orleans was incorporated by act of the Territorial Legislature, approved seventeenth February, 1805, with the powers usually conferred on municipal corporations, including that of raising money for municipal purposes "by tax upon real and personal estate within the city." P. 44.

Under this charter, and such amendments as the Legislature saw fit to make, from time to time, the municipal government was administered until 1836, when, by act approved eighth March, the city was divided into three municipalities, each having a separate government for local purposes, with all the powers, within their respective limits, which had been vested in the undivided city, except that there was one Mayor for the whole city, and a General Council to decide upon matters of general interest. P. 28.

This act required the then existing debt of the city to be paid by the three municipalities, the quota of each to be apportioned on the basis of the amount of taxes and revenues accruing to each: it created a sinking fund for the purpose of paying this debt and interest, section 15; and provided that, in case of reunion, "the debt of each municipality shall be paid by the inhabitants thereof." Sec. 26.

A supplementary act, approved eleventh March, 1836, declared, more specifically, that, if the law establishing the three municipalities should, by any future Legislature, be repealed, or so amended as to unite them into one corporation, "all the debts created by each of the said municipalities shall first be fully paid and satisfied by each municipality separately." Sec. 2, p. 38.

The contingency thus provided for was realized in 1852: the three municipalities were reunited by act approved twenty-third February, p. 42. The Second Municipality became the First District; the First Municipality, the Second District; the Third Municipality, the Third

State ex rel. Southern Bank vs. Pilsbury, Mayor, et al.

District; and by act approved the same day, p. 55, the city of Lafayette was annexed to, and incorporated with the city of New Orleans as the Fourth District.

By subsequent legislation all that part of the parish of Orleans situate on the right bank of the Mississippi was annexed as the Fifth District: Jefferson City, as the Sixth: 1870, p. 30; and the city of Carrollton, as the Seventh District of New Orleans, 1874, p. 119. In each case the city of New Orleans became liable for and assumed the debts of the corporations annexed, as it had done with respect to the three municipalities and Lafayette.

During the sixteen years of separation the three municipalities contracted debts far beyond their resources; and they became greatly embarrassed, and finally insolvent. The Legislature, from time to time adopted measures for their relief: 1839, p. 94: 1847, p. 140: 1850, p. 169; and an act was passed in 1850 for the government and administration of the affairs of the city of New Orleans, "in case the three municipalities should be reunited." P. 156. Nothing was accomplished under this act; and, obvious as the necessity was for a reunion, there were serious difficulties in devising a satisfactory plan, and in adjusting and carrying out the requisite details. The "inhabitants" were not able to pay the debts of each municipality, respectively, as required by section 26 of the act of 1836; and the "municipalities" were not able to comply with the condition precedent imposed by section 3, of the supplementary act, which required that all the debts *created* by each municipality should *first* be fully paid and satisfied by each. The debts of the several municipalities were unequal in amount, and not proportionate either to the population or to the respective values of the taxable property in each; and the constitution of 1845 required that taxation should be equal and uniform throughout the State.

The Legislature of 1852 grappled with these difficulties. By the two acts of twenty-third February, No. 71, section 37, No. 72, section 5, the entire indebtedness of the municipalities and of Lafayette, including the quota of the old city debt apportioned to each municipality in accordance with section 15 of the act of eighth March, 1836, and the separate debt subsequently created by each, was consolidated and assumed by the city of New Orleans; and bonds of the city were issued for the aggregate amount, having not more than forty years to run. The old city debt was divided between the three municipalities in proportion to the value of the real estate within the limits of each, as fixed by the State assessment roll of 1851; and this quota, added to the separate debt created by each municipality, constituted the entire debt of each.

To meet the annual interest, and to provide a sinking fund for the purchase and final payment of these bonds, an annual special tax of

\$650,000 was to be levied on the real estate and slaves in the three municipalities and Layayette, the rate per cent in each to be in proportion to the indebtedness of each. The act also required the Common Council, in the month of January, of each year, to pass an ordinance to raise this sum, to be called the consolidated loan tax; and it declared null and void all ordinances, resolutions, or other acts passed by the Council after the first of January, in each year, "unless the ordinance imposing the consolidated loan tax shall have been previously passed." The city of New Orleans was forbidden to issue any obligation or evidence of debt except the consolidated bonds; or to contract any loan, unless the same be authorized by a vote of the majority of the qualified voters of the city: and it was also declared that no ordinance creating a debt or loan should be valid unless for a single object or work, distinctly specified therein, and unless such ordinance should provide ways and means for the punctual payment of the current interest, during the whole time for which such debt or loan should be contracted, and for the full and punctual discharge, at maturity, of the capital borrowed or debt incurred; and such ordinance was made irrevocable until the capital borrowed or debt contracted, and the interest, should be fully paid and discharged.

It would be difficult to find municipal obligations better secured than these consolidated bonds apparently were. They were recognized as valid by the Legislature in numerous acts, from 1852 to 1874; and they enjoyed high credit in the markets of Europe and America. Under the free banking law of 1855 they were received by the State as security for the redemption of the circulation of the banks; and trust funds to a large amount were invested in them. The interest was paid punctually; and some five millions of the bonds have been paid, or purchased and retired, leaving some four millions outstanding.

The Legislature, on the twelfth March, 1852, passed an act, No. 175, authorizing parishes and municipal corporations to subscribe to the stock of corporations undertaking works of public improvement, to be paid by a tax on landed estate. This act did not authorize the issue of bonds in payment of the stock; and it provided that the stock should belong to the taxpayers, in proportion to the amount of the tax paid by each.

Stringent as the prohibitions of the consolidated act were, the City Council, in May, 1852, by two ordinances, subject to ratification by the qualified voters, took stock in the New Orleans, Jackson, and Great Northern Railroad, to the extent of \$2,000,000, and in the New Orleans, Opelousas, and Great Western Railroad, to the extent of \$1,500,000, payable in the bonds of the city, the interest to be met by a special tax on real estate and slaves. The Legislature, in 1854, by acts 108 and 109,

required the Council to repeal these ordinances, no doubt because they were considered to be unlawful assumptions of power; but by the same acts it authorized the subscriptions, bonds, and special tax in accordance with the ordinances requiring the city to collect and pay the railroad tax for 1853; and by act No. 110, of the same year, the city was authorized to take stock in the Pontchartrain Railroad to the extent of \$1,500,000, with the view of extension to Mobile, payable in bonds, the interest to be secured by tax on all the taxable property of the city. These three acts required ratification by the qualified voters.

By subsequent acts the city was authorized to issue bonds without the formality of popular ratification; so that the entire bonded and floating debt, which aggregated, on the thirty-first December, 1852, \$8,736,238, amounted, on the thirty-first December, 1874, to \$24,741,765.

The owners of real estate and slaves found this tax oppressive, and after submitting to it for four years, 1852 to 1855, inclusive, they memorialized the Legislature for relief. In 1856 the Legislature passed three acts for that purpose, Nos. 93, 134, 164. The first of these limited city taxation on movables, or personal property, and real estate and slaves, to one dollar and fifty cents on the hundred, provided that rate on real estate and slaves should suffice to raise the amount required to pay the interest on the city debt, together with the gradual reduction of the capital of the consolidated debt. This act prohibited the levy, by the City Council, of any tax, whether on movables or on real estate and slaves, which should not be equal and uniform within the limits of, or through the several districts of the city. Act No. 134 subjected to city taxation every species of property, real and personal, with certain specified exemptions; and act No. 164 amended the consolidation act, and enlarged the city charter embodying, substantially, the provisions of acts Nos. 93 and 134. Section 42 of this act required the Common Council to levy, annually, an equal and uniform tax on all property, real and personal; but this taxation was limited to one dollar and fifty cents on the hundred, including the consolidated loan tax and the special railroad tax, provided that rate should be sufficient to pay the interest on the consolidated debt and the railroad bonds issued by the city.

Since the passage of these acts taxation in New Orleans has been at a fixed rate per cent, on all taxable property, according to valuation; but the rate has been changed by the Legislature, as the exigencies of the city required. Out of the sum thus raised the amount required for the consolidated loan tax was set apart annually, and applied to the consolidated debt.

By act No. 5, extra session, 1870, the Legislature forbade the process of mandamus against any auditing or disbursing officer of the city,

to compel the issuing of any warrant for or to enforce the payment of any money claimed to be due by the city. This act required all actions for money claimed of the city to be instituted, in the ordinary form, against the city as a corporation. It prohibited the issuing of any execution or *feri facias* to enforce any judgment against the city: it provided for the registry of such judgments by the auditing officer; and made them payable, in the order of their registry, either out of money in the treasury or out of the next annual budget.

In 1874, by act No. 53, the Legislature postponed, until December, 1876, the levy and collection of any tax, by the city of New Orleans, for a sinking fund, for the purchase of its bonds; but it expressly provided that "this act shall in no wise be construed to hinder, delay, or affect the payment of the interest on the bonds of said city, as the same shall mature; and *provided further*, that the validity of the consolidated bonds of the city of New Orleans is hereby recognized in all its integrity, it being the object of this act to afford temporary relief to the taxpayers of New Orleans, in the embarrassed condition of affairs, and not to detract from or impair the rights of the holders of said bonds or others." P. 92.

In 1876 an act was passed, No. 31, commonly known as the premium bond act, authorizing the city of New Orleans to fund its entire bonded debt. Section seven of this act prohibited the levy of any city tax, either for 1876, or for any year thereafter, for the payment of other bonds, or interest on other than the premium bonds. All laws authorizing the City Council to levy any tax whatsoever for other bonds, or interest on other bonds, were repealed; and the courts of the State were declared incompetent to compel the officers of the city, by mandamus, to levy and collect any interest tax other than that provided for in the act.

The Southern Bank, holder of 613 of the consolidated bonds, formally demanded of the city, in December, 1876, and in December, 1877, compliance with the requirements of the consolidation act. The city having thus been put in default, this suit was brought against the Mayor and Administrators, to compel them, by mandamus, to levy and collect a special tax, by separate and distinct assessment, of \$650,000, on the real estate subject to that tax, for each of the years 1874 to 1878, inclusive, less coupons paid in 1874 and 1875: and by injunction to prevent the levy, by the Mayor and Administrators, of any tax on the real estate within the city limits subject to taxation in favor of the consolidated loan debt, under the act of 1852, without first having provided for that debt. The petition states at length and minutely the history of the consolidated debt and bonds, which we have endeavored to condense, and to connect with the legislation by which they may be affected; and

it charges that "the city and the taxable real estate within its limits are liable for the payment of the matured coupons, and for the purchase of the bonds, to the extent of \$650,000 per annum for the years 1874 to 1878, inclusive, less coupons paid in 1874 and 1875, the amount of which relator knows not."

The petition also charges that the city is estopped from denying the validity of the bonds and coupons, and the obligation to levy the special tax under the provisions of section 37, of act 71 of 1852, by reason of the judgment of the circuit court of the United States in the case of *Rosalie Maenhaut vs. the City of New Orleans*, "wherein the city denied liability for the debt and wherein the circuit court declared said section 37 to be a *contract*, binding on the city, the State, and the bondholders, and has ordered and compelled a distribution of taxes realized, and has reserved all the rights of complainants to a mandamus to compel the levy and collection and application of said special tax, at a future time, to its legitimate objects."

The mayor and administrators excepted to the jurisdiction of the court, setting up and relying upon the acts of 1870 and 1876, already referred to.

They also excepted that no ministerial duty is imposed on them to levy or collect the tax sought to be enforced by mandamus; on the contrary, they are forbidden by the act of 1876 to levy said tax for 1876, or any year thereafter: and that the act of 1874 suspended the levy of any tax for sinking fund, under act 71, of 1852, until December, 1876; and that a tax was levied and collected to pay the interest on the consolidated bonds until 1876, when it was forbidden by act 31, of that year.

In their answer respondents repeat, substantially, the defenses set up by way of exception. They also plead that section 37, of the act of 1852 is unconstitutional and void, because the objects of that section are not expressed in the title, as required by the constitution of 1845, art. 118, which was in force at the date of the passage of that act.

They plead that the tax provided for in section 37, of the act of 1852, is violative of art. 127, of the constitution of 1845, and art. 123, of the constitution of 1852, because it is to be assessed on real property and slaves alone; and because the rate per cent of the tax, in each municipality, is to be in proportion to the indebtedness of each; and that all the subsequent acts referred to by relator as recognitions of the bonds and tax specified in section 37, of the act of 1852, are, upon the same grounds, wholly unconstitutional and void.

Weekerling and others, owners of real estate in the First, Fourth, and Sixth Districts, intervened, alleging that their property was not liable to the special tax imposed by the act of 1852; and that that act is violative of articles 118, 127 of the constitution of 1845, and 115, 123 of the

constitution of 1852. They joined respondents in opposing relator; and they alleged that an injunction will not lie on a petition in the form adapted to mandamus.

Thomas H. Hunt, the owner of premium bonds of the city, intervened, and set up the defenses plead by respondents. He opposed the injunction prayed for, on the ground that, if granted, it would arrest the mayor and administrators in the performance of their proper legislative and executive functions, overthrow the city government, and result in anarchy.

He set out at some length the constitutional objections to the act of 1852, based upon the alleged defect in the title, and the want of equality and uniformity in the tax; and he specially objected to so much of section 37 of the act as restricts the legislative functions of future Legislatures, and the exercise of such legislative powers as may be conferred, from time to time, by the Legislature, upon the mayor and council, as null and void, being beyond the power of the Legislature of 1852, or any other year.

Montgomery and others, taxpayers, intervened, admitting the validity of the bonds, and joining relator in his prayer for mandamus so far as it relates to the tax for 1878 and future years; but they opposed and protested against it for previous years, on the ground that the imposition of taxes for such an amount would be ruinous, and would lead to bankruptcy.

Finally, the State of Louisiana intervened, claiming to be the owner of 213 of the consolidated bonds; and joining relator in his demand.

Respondents filed a supplemental answer, setting out more specifically the constitutional objections to the act of 1852; pointing out alleged defects in the title; and exposing the inequality and want of uniformity in the special tax on real estate and slaves alone.

Relator objected to the filing of the interventions in opposition to its demand, on the grounds, that interventions are not allowed in mandamus proceedings of the character of the present one; and that no party can be allowed to intervene unless he shows a direct personal interest which would be irreparably injured by the judgment apprehended, and unless such party could bring a direct action for the purpose of recovering the object of his intervention.

The form of action can not control the right to intervene. Whenever there is a suit, a plaintiff on the one side demanding, and a defendant on the other side resisting, a third person may, by timely application to the court, on proper showing, be made a party. C. P. 389.

"In order to be entitled to intervene it is enough to have an interest in the success of either of the parties, or an interest opposed to both." C. P. 390.

The taxpayers, intervenors in this case, are very much interested in the success of respondents, and in opposing the demand of relator to have a large sum levied and collected as a tax on their property, as well as on that of others. The holder of the premium bonds is very much interested in opposing the mandamus and injunction which would interfere with, perhaps prevent, the levying of any tax to pay the accruing interest on his bonds.

There is no analogy between this case and that of Roudanez and others, 29 An. 271. In that case the Legislature having authorized the mayor and administrators of New Orleans to hold an election, for the purpose of taking the sense of the people as to the levy of a tax in aid of the Pacific Railroad, Roudanez and others sought, by injunction, to prevent the holding of the election. We held that this could not be done; that the Legislature had the right to submit such a question to the people, whenever it saw proper to do so; that the tax had not yet been authorized; and that plaintiffs had no interest and no right to prevent the holding of the election, the result of which might or might not be the consent of the people to the tax.

In this case the direct object is to have a tax levied and collected at once. We think the taxpayers had the right to intervene and to be heard.

Relator also objected to the filing of the supplemental answer, on the grounds, that, if the first answer be true, the second could only be a reiteration of the first, and would, therefore, be irrelevant; or, if the second answer was different from the first, it would change the issues, and, therefore, would be inadmissible.

The supplemental answer does not conflict with the original answer. It is an amplification of the original; it did not retard the trial; and it required no other or different proof than that which was required under the original. We think it was properly received.

The district court made the mandamus peremptory, but refused the injunction; sustained the intervention of Montgomery and others, and of the State of Louisiana, in so far as they joined in the prayer of relator for mandamus and injunction, and refused their prayer in other respects, and ordered the intervention of Weekerling and others to be stricken out, and that of Hunt to be dismissed as in case of nonsuit.

From this judgment Weekerling and others, the mayor and administrators, and Hunt appealed separately. Relator in answer to the appeal asks that the judgment be so amended as to grant the injunction as prayed for; and be affirmed in other respects.

The issues thus presented to us for solution are of the utmost gravity; and they have been argued with great ability by the distinguished counsel representing the several parties. A review of all the

authorities cited by them is not possible within the compass of a judicial decision, nor can we attempt a synopsis of the points presented and argued in a discussion which occupied five days.

Many of the matters discussed are of great public interest; but some of them we have no power to pass upon judicially on this appeal. No bonds are before us except the consolidated bonds. True, the holder of premium bonds intervened; but he does not seek to enforce his bonds; nor does he ask for any judicial recognition of them. He states that he is the holder of these bonds merely as inducement, for the purpose of showing his interest and his right to intervene. The only decree which we have jurisdiction to render, under the pleadings, is such as may be proper, in our judgment, either affirming or reversing the judgment appealed from. We shall endeavor, therefore, to limit our inquiry to the points and questions tending to the determination of the matters passed upon by the district court: the right of the relator to the relief sought, by mandamus and injunction.

Before proceeding further we think it proper to say that, in our opinion, the judgment of the circuit court of the United States, in *Maenhaut and others vs. the city of New Orleans*, is not *res adjudicata*; and that it does not operate as an estoppel, against the mayor and administrators, on any of the questions involved in this case. Money was collected by the city authorities for taxes, out of which a certain amount had been set apart, and deposited with the fiscal agent, to be applied to the consolidated debt. The mayor and administrators undertook, in July, 1875, out of the whole of the taxes so collected, to pay fifty per cent, on account of the interest due on the entire bonded debt of the city, if the holders of the matured coupons would accept the arrangement. Maenhaut and others, holders of consolidated bonds, brought suit to prevent by injunction the proposed distribution of the tax money; and they also demanded the specific enforcement of the Act of 1852.

The court decided that complainants were entitled to distribution, ratably, "of the money actually on deposit to the credit of the consolidated coupons overdue and held by them." To that extent the preliminary injunction was maintained; and in all other respects the bill was dismissed, "reserving the right of the complainants to urge at law the claims by them herein set up."

Obviously, when the taxpayers had paid the money, and the city authorities had set apart and deposited a certain amount to the credit of outstanding matured obligations, it was no longer in the power of the mayor and administrators to change its destination, or to apply the money, "actually on deposit to the credit of the consolidated coupons," to any other purpose.

We may add that in a later case, *Vignier vs. the Mayor and Ad-*

ministrators, in the circuit court of the United States, the District Judge sitting, the judgment in Maenhaut's case was held not to conclude the city; and the mandamus prayed for by the holder of consolidated bonds, to compel the levy and collection of the special tax, was refused.

From the history which we have given of the consolidated bonds, it is manifest that they were issued for a good and meritorious consideration. They represented what remained unpaid of the old city debt, contracted prior to the separation in 1836, and the debts of the several municipalities contracted during the separation.

The consolidation of the city of New Orleans made it necessary for the city to assume these debts, because, by the consolidation, the city took and became the owner and administrator of all the means and resources of the municipalities for paying debts, and the municipalities ceased to exist as separate bodies. Assuming these debts, it was necessary for the city to put them in a shape that would be acceptable to the creditors, and would give the city, the new debtor, time to provide the means of paying them. Bonds payable at a distant day, bearing interest, constituted the only form of obligation that would meet the emergency; and they are the most usual and convenient form of municipal obligations.

The validity of these bonds is questioned on the single ground that section 37, of the act of 1852, under which they were issued, is violative of art. 118 of the constitution of 1845, which declared that, "every law enacted by the Legislature shall embrace but one object, and that shall be expressed in the title."

The title is "An act to consolidate the city of New Orleans, and provide for the government and administration of its affairs." The single object of the act was to consolidate the city of New Orleans: to bring back its dissevered members, and to put an end to their separate existence by uniting them under one government. The consolidation required some provision for the government and administration of the affairs of the new corporation thus created; and all the details and particulars in the body of the act, germane to the one object, the single purpose contemplated by the Legislature, without which that purpose could not have been accomplished, are sufficiently indicated and expressed in the title. The immediate cause of the consolidation was the utter inability of the municipalities to pay the debts for which they were separately bound, and to substitute the city, in all things pertaining to municipal government, for the municipalities. The issuing of these bonds was an act of administration of the affairs of the city, devolved upon it by the consolidation, and necessarily pertaining to the government of the city.

The act of 1852 was a waiver of the condition precedent established

State ex rel. Southern Bank vs. Pillsbury, Mayor, et al.

by section 3, of the supplementary act of 1836; and a repeal of that section. But the framer of section 37 was evidently controlled by the idea that the requirement of section 26, of the act of March 8, 1836, must be enforced; and the debts of each municipality must be paid by "the inhabitants thereof." The original partition of the old city debt, under section 15, of the act of 1836, on the basis of the amount of taxes and other revenues accruing to each municipality, was apparently equitable, and we are not informed of the motives for the departure from that apportionment, and the new apportionment, in section 37, on the basis of the value of real estate within the limits of each municipality, as fixed by the State assessment roll of 1851.

Having thus fixed the quota of each municipality, by an invariable and arbitrary standard, and established the portion of the aggregated debt to be paid by each by adding to this quota the debt created by each, section 37 required the inhabitants of each municipality to pay their respective portions of the consolidated debt by an annual tax on the real estate and slaves owned by them, without respect to their value, the per centage in each municipality being in proportion to the amount of the indebtedness of each.

We have no means of ascertaining the relative values of real estate and slaves, or of other taxable property, in the several municipalities, in 1851, nor subsequently. In the nature of things the taxes imposed by the act of 1852 could not have been equal and uniform. During the forty years of the running of the consolidated bonds many of the slaves would die, and any and all of them might have been removed beyond the limits of the city at any time, so that they would not have been within the reach of city taxation: and great changes would necessarily take place in the actual and relative values of real estate in different parts of the city, while the portion of the debt to be paid by the inhabitants of each subdivision was irrevocably fixed. The assessment rolls from 1870 to 1877, inclusive, were offered in evidence; and they show how unequally and oppressively the tax as fixed by section 37 would operate now. The real estate in the First District, in 1870, was valued at \$50,986,125: personal property at \$16,148,140: in 1877, real estate \$36,611,165; personal property at \$17,187,620. In the Second District, in 1870, real estate \$29,870,975: personal property \$5,118,102: in 1877, real estate, \$21,578,925, personal property \$2,792,295. In the Third District, in 1870, real estate \$10,693,723; personal property \$809,005. In 1877, real estate \$9,497,765; personal property, \$639,282. In the Fourth District, in 1870, real estate \$14,683,995; personal property \$909,416: in 1877, real estate \$12,374,530; personal property \$800,828.

The practical operation of this mode of taxation shows how great the disparity was during the four years, from 1852 to 1855, inclusive,

State ex rel. Southern Bank vs. Pillsbury, Mayor, et al.

after which it was abandoned. The aggregate of the per centage levied on real estate and slaves for these four years, for all purposes, was: In the First District, 858½; in the Second, 809½; in the Third, 1071½; and in the Fourth, 765½; while all other taxable property in the city paid only 295, for all purposes, in these four years.

The constitution of 1845, art. 127, which corresponds with art. 123 of the constitution of 1852, and art. 118 of the existing constitution, is as follows:

“Taxation shall be equal and uniform throughout the State. After the year 1848 all property on which taxes may be levied, in this State, shall be taxed in proportion to its value, to be ascertained as directed by law. No one species of property shall be taxed higher than another species of property of equal value, on which taxes shall be levied.”

It would be a waste of words to attempt to show the manifest inequality and want of uniformity in the tax imposed by section 37 of the act of 1852. It was flagrantly in conflict with the constitution of 1845.

Counsel for relator urge that art. 127 of the constitution of 1845 was applicable only to taxation by the State, and not to municipal taxation: and they rely on *Second Municipality vs. Duncan*, 2 An. 182; *Cummings vs. Lafayette*, 3 An. 674; and *Buffington vs. Dinkgrave*, 4 An. 548.

In *Duncan's* case, the Second Municipality, on the 29th August, 1846, levied a tax of one per cent on all the real estate within its limits. *Duncan* opposed this tax as being unequal. The only proof seems to have been the admission that there was no special ordinance of the municipality assessing taxes on personal property. Under the constitution of 1812 it was held that the Legislature had power to select the objects of taxation; and, that to be equal and uniform, the tax must be the same on the objects so selected.

Under the charter of 1805 the city of New Orleans had the power to tax real and personal estate; and this power belonged to the municipalities during their separation under the act of 1836. Jurisprudence had settled that it was not necessary for the city or the municipalities to exercise all the power thus conferred by taxing all property real and personal; and the tax in this case was equal and uniform on all the property selected, real estate.

The equality and uniformity thus understood had been observed in the tax in question; and it will be borne in mind that the part of article 127 of the constitution of 1845, which forbids the taxing of one species of property higher than another species of property of equal value, was expressly postponed in its effect until after 1848. Chief Justice Eustis, who was the organ of the court, did say that this article of the consti-

tution "by its very terms, applies to State and not to municipal taxes. It provides for the equality and uniformity of taxation *throughout the State.*" 2 An. 183. But there was no occasion to say any such thing, for the reason that the tax in question was lawful under the constitution of 1812, and the city charter of 1805; and that part of the constitution of 1845 which might have made it unlawful did not take effect until a year after this decision was rendered, nearly two years after the tax was levied.

In *Lafayette vs. Cummins*, the suit was for license tax on defendant's occupation. Judge Eustis, who was again the organ of the court, referring to *Duncan's* case, 2 An., said that, after thorough argument, article 127 was held to be applicable to State, and not to municipal taxes. Surely there was no occasion for this dictum. The tax was levied on the occupation, under authority of an act of the Legislature; and every person pursuing that occupation was subject to the same tax. There is no other mode of levying such a tax; and it was equal and uniform, strictly within the letter and spirit of article 127.

In *Buffington vs. Dinkgrave* the tax in question was a city license on the occupation. The inequality of the tax was urged, mainly on the ground that a part of the year had already expired when the plaintiff became subject to the tax. It did not appear that the tax was other than that imposed on all persons pursuing the same occupation: and no law required the city to fractionize the license tax. The court disposed of the objection by a simple reference to the cases of *Duncan* and *Cummins*. But as the tax was equal and uniform, in that it was imposed alike on all persons pursuing the same occupation, it was not in conflict, but in strict accordance with article 127.

We can not assent to the proposition that article 127 of the constitution of 1845, and article 123 of the constitution of 1852, were not applicable to municipal taxation. The decision in *Duncan's* case was rendered on the 15th February, 1847. The Legislature was then in session; and it hastened to place the taxpayers of New Orleans under the ægis of this constitutional provision. By act approved May 4, 1847, No. 192, page 147, it was declared that "taxation within each municipality shall be equal and uniform. After the year 1847, property on which taxes may be levied in each municipality shall be taxed in proportion to its value. No one species of property shall be taxed higher than another species of property of equal value, on which taxes shall be levied."

We can not regard the words "throughout the State," as used in the first *alinéa* of article 127, as limiting the operation of the great principle which it declares. On the contrary, they convey to our minds the idea that in no part of the State of Louisiana can taxes not equal and uniform be lawfully levied, whether by the State government or by

State ex rel. Southern Bank vs. Pilsbury, Mayor, et al.

the municipal governments on which the Legislature has chosen to confer taxing power. The principle of equality and uniformity in taxation is inherent in, it underlies every system of government not despotic; and it acquires no additional force by the formulated expression of it in the organic law, which, in that respect, is simply declaratory.

The subsequent phraseology of article 127 seems to us to place the meaning beyond doubt. It relates to property on which taxes may be levied *in this State*. Taxes may be levied on property *in this State* for State purposes, for parochial purposes, for municipal purposes: and there is not one word in the article in question which limits its meaning to taxation by the State for State purposes, or indicates the intention of the Convention, while guarding the rights of the citizen against unequal and oppressive taxation by the State, to leave them at the mercy of police juries in the several parishes, and mayors and aldermen, or councils, in the numerous towns and cities of the State.

Certainly it would not be possible to establish an equal and uniform tax for every parish and town and city, because their exigencies and requirements and resources are different. What the constitution means, what the law of equality and uniformity requires is, that the tax, if levied by the State, must be at the same rate throughout the State, and upon the valuation of the property taxed. If levied for parochial purposes, all the property taxed in the parish must be at the same rate on valuation. If the tax be for municipal purposes, it must be at the same rate, on valuation, throughout the limits of the corporation. Any tax levied, in any part of the State, by any taxing power, which does not conform to this rule of equality and uniformity, so precisely formulated in article 127, is unconstitutional, *ultra vires*, and void.

We can not assent to the dictum in Duncan's case for another reason: and that is, that, confessedly, after the year 1848, the Legislature had no power, under the constitution of 1845, to tax one species of property higher than another species of property taxed, of equal value; and the Legislature could not confer upon a municipal corporation, the mere creature of its will, any power which it could not exercise by direct legislation.

The profound respect which we entertain for the late Chief Justice Eustis, and the other eminent jurists who composed the Court over which he presided, has imposed upon us the necessity of stating, at greater length than we should otherwise have done, our reasons for holding, in opposition to their opinion, that article 127 of the constitution did control municipal taxation, and that all taxing power throughout the State, in any and every part of the State, must be exercised in strict conformity to the principle of equality and uniformity, first formulated in that article, and preserved, substantially, in all the subsequent

State ex rel. Southern Bank vs. Pillsbury, Mayor, et al.

constitutions. See *Gilman vs. Sheboygan*, 2 Black, 510; *Talcott vs. Pine Grove*, 19 Wallace, 675, and cases there cited from State courts.

If it be conceded, and we do not care to discuss that proposition now, that under the constitution of 1845, after the year 1848, the Legislature or a municipal corporation could select one species of property, and impose a tax upon that species of property alone, excluding any other species of property made taxable by law, it would not thence follow that the tax could be so levied on that species of property, whether by the State or by a municipal corporation, that the rate on valuation could be higher in one part of the State, if taxed by the State, or in one part of the city, if taxed by a municipal corporation, than in any and every other part of the State or corporation. Our attention has not been called to any decision or dictum sanctioning any such manifest injustice. But this is precisely what the Legislature did, by section 37 of the act of 1852. The boundary between the Second and Third Districts is Esplanade street. The owner of real estate and slaves on the up-town side of Esplanade paid per centages, for the four years ending in 1855, aggregating 809½, while his neighbor on the opposite side of that street paid, in the same period, 1071½. Canal street separates the First and Second Districts. The proprietor on the upper side of Canal street paid 858½, while the owner of property on the lower side paid 809½. Felicite street is the dividing line between the First and Fourth Districts, and while the property on the lower side of that street paid 858½, that on the upper side paid 765½.

Such injustice was too glaring to escape the notice of the Legislature; and the Acts of 1856 put an end to it by subjecting all taxable property in the city of New Orleans to the same rate per cent upon the same basis, valuation.

Counsel for relator insists that section 37, of the act of 1852, is a contract, binding on the State, the city, and the bondholders. Unquestionably there was a contract, and a very simple one, between the city and the bondholders. The city assumed the debts for which the several municipalities and Lafayette had been liable; and it executed its bonds, bearing interest, payable semi-annually, for the amount. The city also undertook to raise the sum of \$650,000 per annum to pay the accruing interest and to provide for the gradual extinction of the bonds. The bonds were the evidence of the contract: the contract was to pay the amount stipulated, principal and interest. That was the obligation of the contract; and that obligation is placed under the protection of the constitution of the United States, as well as of that of the State of Louisiana.

But was it a part of this contract that the city should issue no other bonds or evidences of debt, during the forty years of the running of

these bonds? We think not. So long as the city paid the interest punctually, it was no concern of these bondholders what amount of debt might be contracted toward other persons. Legislative power and the sovereignty of the State may be assimilated to paternal power, which can not be surrendered at will. The powers conferred on municipal corporations are subject, and must ever remain subject to legislative control; and the Legislature of to-day can not impose restrictions on the powers of a municipal corporation which a future Legislature can not modify or abrogate, except where some vested right might thereby be divested, or the obligation of some contract be impaired. In *Board of Liquidators vs. McComb*, the Supreme Court of the United States said:

"We are not prepared to say that the Legislature of a State can bind itself, without the aid of a constitutional provision, not to create a further debt, or not to issue any more bonds. Such an engagement could hardly be enforced against an individual; and when made on the part of a State, it involves, if binding, a surrender of a prerogative which might seriously affect the public safety. The right to procure the necessary means of carrying on the government by taxation and loans is essential to the political independence of every commonwealth." 2 Otto, 535.

These views are applicable to a municipal corporation. The Legislature of 1852 had the power to forbid the city to issue any obligation or evidence of debt; and the incapacity would continue until it was removed by the Legislature. The Legislature might refuse to confer on a municipal corporation the power to issue any bond, for any purpose; but it could not bind any future Legislature not to confer that power. We find, in point of fact, that the Legislature, two years after, in 1854, did authorize the city of New Orleans to issue its bonds for five millions, to pay for stock in railroads; and to provide for the interest on three millions and a half of that amount by special tax on real estate and slaves. This may not have been wise: it certainly proved most disastrous to the city; but the Legislature clearly had the power to remove the restrictions imposed by the act of 1852.

It did not concern the bondholders that the old city debt should be apportioned to the inhabitants of the several municipalities; because, as to them the separate indebtedness of the municipalities had been novated and discharged by the assumption and bonds of the city. It was no part of the contract with them that the quota of the old city debt to be paid by the inhabitants of each municipality should be fixed on the basis of the value of the real estate in each in 1851; and that this quota should be added to the separate debt created by each in order to ascertain and establish the amount of the entire debt of each. These details did not concern the bondholders: they were simply the result of the

design of the Legislature to make the inhabitants of each municipality pay the debts of each, as provided by section 26, of the act of 1836. It was no concern of the bondholders that the annual sum to meet the interest, and finally to pay the bonds, should be levied on real estate and slaves alone. Indeed, so far as their interests were concerned, it would seem that they would naturally have preferred to have the entire taxable property within the city limits subjected to the payment of their bonds. Why these objects were selected we do not know; but it may be that it was because real estate and slaves constituted the greater part of the taxable value, and were sufficient; and that the city desired to reserve the entire taxable capacity of every other species of property for other municipal purposes. All these details and arrangements were purely domestic; they concerned no others than the inhabitants themselves; and their whole scope and design was to adjust, among the inhabitants, their respective contributive shares to the payment of what had become the common debt of the whole city.

In the Sheboygan case, an act of 1854 provided that a tax to meet certain railroad bonds should be levied on all the taxable property in the city. In 1857 the Legislature thought proper to restrict this tax to real estate exclusively. The suit was by an owner of real estate taxed under the act of 1857, whose property had been sold for the tax. The court said the act of 1854 was not a contract. "The imposition, modification, and removal of taxes, and the exemption of property from such burdens is an ordinary exercise of the power of State sovereignty. There was no pledge, express or implied; that this power should not thereafter be exercised." 2 Black, 513.

It was not a bondholder who complained in that case; but the principle is applicable to the complaint by a bondholder, unless it were shown that the property exclusively subjected was not sufficient to pay the debt. Certainly it applies with much more force to a case, such as that which we are dealing with, in which there has been not a withdrawal of property originally subjected to taxation for the payment of the bonds, but the subjection of the entire taxable property of the debtor, in lieu of the special objects originally subjected.

The Legislature of Louisiana, in 1856, chose, in the ordinary exercise of the power of State sovereignty, which it has no power to surrender, to require all property to be taxed at the same rate, on the same basis, valuation. This effectually repealed the special tax on real estate and slaves exclusively; but it did not impair the obligation of the contract with the bondholders, nor did it diminish either the sum to be raised annually for the consolidated debt, nor the resources from which that sum was to be raised. In Layton's case, 12 An. 515, this court held the act of 1856 to be in strict conformity to the constitution. It equalized

State ex rel. Southern Bank vs. Pillsbury, Mayor, et al.

taxation; and relieved the inhabitants of the burden of paying, in each district, the debt of that district, and imposed it equally on the whole city, and its entire taxable property.

The bondholders have no right to interfere with the administration of the city government, by requiring a certain order in the business of the legislative department of that government, and claiming the nullity of its proceedings if not in conformity with that order: nor can they, nor any other creditors of the city, compel the city government to levy a special tax on one species of property exclusively, for their benefit. If these bondholders ever had any right to demand the levy of a special tax, it was a tax on real estate and slaves. But the five millions of dollars worth of slaves once subject to taxation in New Orleans have ceased to be property; and the burdens of the owners of real estate would be thereby greatly increased, if the whole tax should now be levied on their property alone. Such a change was not contemplated by any of the contracting parties; and it would be equitable and just to relieve the owners of real estate of this additional burden, by subjecting to the payment of these bonds all the taxable property within the city limits, if that had not already been done by the acts of 1856.

We think that section 37, of the act of 1852, in so far as it authorized the special tax on real estate and slaves, was violative of art. 127 of the constitution of 1845, then in force. That it was repealed to that extent by the acts of 1856: that the acts of 1856, in that respect, are in strict accordance with article 127 of the constitution of 1845, and the corresponding article, 123, of the constitution of 1852; and that they in no manner impair the obligation of any contract with the bondholders, or with any other person whomsoever. The levy of the special tax on real estate, as prayed for by relator, is legally impossible.

It is urged by counsel for relator that the opinion of the court in the cases of Duncan, Cummins, and Buffington interpreted the constitution of 1845; and that the bondholders acquired their rights with reference to this interpretation; that art. 127 was not applicable to municipal taxation. The answer is, if this be conceded, that, in Duncan's case the court decided nothing more than that the Legislature, or its creature, a municipal corporation, had the power to select a single object of taxation, real estate. In that case the object so selected was taxed equally at a uniform rate, one per cent, on the assessed value: and in the other cases the taxes were equal and uniform, being a fixed sum on the trade or occupation in each case. No court in Louisiana, so far as we know, has decided that when the object of taxation has been selected it could be taxed at one rate, on a given basis, in one part of the State or city, and at a different rate, or upon a different basis, in another part of the city or State. If the constitution of 1845 did not forbid such inequality

in municipal taxation, it was forbidden by the fundamental, inherent principle that taxation must be equal and uniform on the property taxed.

If the whole of section 37, of the act of 1852, entered into and constituted the contract between the bondholders and the city, we incline to the opinion that the whole contract would be void, because of the manifest inequality and want of uniformity in the special tax. But we think the contract with the bondholders was that of which the bonds are the evidence, the lawful obligation of the city to pay the principal and interest as stipulated.

Relator maintains that at the time these bonds were issued the holders were entitled by law to compel payment by mandamus: that the right to use this remedy entered into and formed part of the contract; and that they can not be deprived of this right by subsequent legislation.

Laws relating to the forms of judicial proceedings are remedial; and the form, in any case, must depend on the law in force at the time the proceeding is instituted, without regard to the law at the time the facts on which it is based occurred. If before the final decision a new law should intervene and change the form, the form originally resorted to can no longer be pursued, unless the new law expressly declares that the pre-existing form shall be followed in the cases then pending. No individual can claim a vested right in the remedial process by which his demand might have been enforced at the time it accrued, when the Legislature has chosen, subsequently, to abolish that process. See *Ludeling vs. His Creditors*, 4 Martin N. S. 603; *Scott vs. Duke*, 3 An. 253, and authorities there cited. What the suitor has a right to claim is the use of such remedy as may be adequate to his demand, not that he shall be permitted to enforce that demand in any special form, or by any specific process. These views are fully sustained by the decision of the Supreme Court of the United States in *Tennessee vs. Sneed*, 6 Otto, and by many decisions of that court, and of the State courts cited at pages 73, 74. The proceeding in *Tennessee vs. Sneed* by mandamus was brought after that form of proceeding, in such cases, had been prohibited by the State Legislature. The Supreme Court of Tennessee refused the writ; and the Supreme Court of the United States, on writ of error, affirmed that judgment.

By the Code of Practice, article 746, final judgments rendered in other States, or foreign countries, might be enforced summarily by executory process, just as mortgages may be enforced now, without previous citation of the debtor. The Legislature chose, by act of 1846, p. 166, to repeal this provision of the law. Several cases in which this form had been resorted to were pending, some on appeal, at the date of

State ex rel. Southern Bank vs. Pillsbury, Mayor, et al.

the passage of the act of 1846. This court held, in every case, that this change, pending the proceedings, even on appeal, deprived the courts of the power to proceed further. The repeal of the former law did not divest vested rights, nor did it deprive the judgment creditors of adequate remedy. It prohibited the summary process allowed by the former law; and remitted them to the ordinary form of suit by petition and citation. See *Scott vs. Duke*, 3 An. 253; *Kilgore vs. Planters' Bank*, same, vol. 693; *Commercial Bank vs. Markham*, same, 698; *Featherstonh vs. Compton*, 8 An. 285.

The law to-day authorizes the mortgagee to have the mortgaged property seized and sold by executory process, summarily, without previous citation of the mortgagor. The remedy is expeditious; and, no doubt, the right to enforce mortgages summarily makes that form of security more desirable, more valuable. The Legislature may repeal this law at any time, and remit the mortgagee to the ordinary form of proceeding, by petition, citation, judgment, and execution. Could any mortgagee pretend that this would be unlawful interference with his vested rights; or that the obligation of the contract would be thereby impaired?

In *Strauss vs. Brown*, 30 An. 79, a creditor sought to enforce his demand against the city of New Orleans by mandamus to compel the auditing officer to issue to him a warrant for the amount. We held that act No. 5, of 1870, extra session, prohibited the remedy resorted to: that it compelled the creditors of the city to proceed in the ordinary form; and, after having obtained judgment, that it might be registered in the office of the Administrator of Public Accounts, and paid out of the next annual budget, as required by the act.

We also decided, in that case, that the act of 1870 does not deprive the creditors of the city of adequate remedy, that is, such remedy as creditors in general have against their debtors, by suit in the ordinary form. Having obtained judgment, the creditor must proceed to have it paid in the manner required by the act, and not otherwise. The right of relator, *Strauss*, accrued in 1876, under the dominion of the act of 1870; and we did not find it necessary to express any opinion as to the effect of the act with respect to pre-existing contracts and obligations.

In the *Carondelet Canal Company vs. the Mayor and Administrators*, the relator had obtained judgment against the city in the ordinary form, and had caused it to be registered in the office of the Administrator of Public Accounts. The mayor and administrators had failed to provide for the payment in the next annual budget after the registry, as required by the act.

We held that the duty of the mayor and administrators was plain, and the right of relator absolute; and that there was no means or pro-

cess by which this right could be enforced, otherwise than by mandamus. We accordingly made the mandamus peremptory, requiring the mayor and administrators to provide for the payment of this judgment out of the next annual budget. 30 An. 129.

The present case differs from that of *Strauss vs. Brown* in that the right of relator accrued long before the passage of the act of 1870; and it differs from the *Carondelet Canal* case in that relator has not obtained judgment against the city, nor attempted to enforce its rights in the mode prescribed by that act. We think this act pertains entirely to the remedy: that it is within the constitutional power of the Legislature; and that it is obligatory alike on creditors of the city, whether their rights accrued prior to 1870 or subsequently.

If the seventh section of the act No. 31, of 1876, admits of no other interpretation than that it deprives any class of creditors of the city of New Orleans of the right to enforce their demands by judicial process, we think it would be in excess of legislative power, and void. But if it is susceptible of the construction that it forbids creditors, bondholders, and others, to proceed directly by mandamus to compel the levy and collection of a tax to pay the amounts due them, and requires all such creditors to proceed under the act No. 5, of 1870, we think it would not be violative of any legal or constitutional right.

If the seventh section of the act should be held to be violative of the constitution, it would not thence follow that the entire act is unconstitutional. We do not find it necessary to pass upon this act, because the views which we have already expressed suffice to dispose of this case; and we prefer to reserve any expression of opinion as to the validity of the act, in whole or in part, until the question shall be presented to us in such shape and between such parties as will give us jurisdiction. Without reference to this act, the relator is not entitled to the relief which he seeks; and that is the only matter to be determined on this appeal.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed, and that the demand of relator be rejected and dismissed, with costs in both courts.

CONCURRING OPINION.

DEBLANC, J. For upwards of twenty-five years, the validity of the bonds held by relator have been—again and again—acknowledged by the Legislature and the Courts of this State, by the authorities of the City of New Orleans, and by those who—until 1874—have been taxed to redeem those undisputed and indisputable obligations.

Those bonds evidence—not the separate debt of a limited class, not

a debt contracted by or in the exclusive interest of the owners of real estate, but the debt of the city, one which can be enforced—proportionally—against all of those for or by whom it was contracted, on the whole of their property, and assuredly not—as unjustly commanded by the 37th section of the act of 1852—against an arbitrarily selected fraction of the debtors, not on an arbitrarily designated species of property, not according to an assessment made since more than a quarter of a century, which no longer represents the value of even the property on which that unequal and iniquitous tax was imposed, but by the levy of a proportional tax on both the real and personal property of those who—collectively and not otherwise—are liable for that common debt, the primordial and subsisting validity of which is not and could not be successfully assailed.

With or without any constitutional enactment, as well before as since the adoption of the constitution of 1845, 1852 and 1868, a tax which—legitimately—can never be but a general and proportionate contribution, levied to carry out a public enterprise, to satisfy a public liability, neither can nor could be considered as equal and binding, unless imposed—according to circumstances—throughout the State, or throughout any of its subdivisions—on every species of property, except such as in every civilized State—is tacitly or expressly—exempted from taxation by common consent or constitutional restrictions.

The act of 1852 imparted to the consolidated bonds a validity which no subsequent legislation could or can impart; but that act did not so far suspend and paralyze the Sovereignty of the State, that—after its promulgation—the State was powerless to correct a manifest error, to discontinue an indefensible injustice, to enlarge—within its own limits or the limits of any of its subdivisions—the category of the taxable property, and to more effectually secure—by the creation of an additional quantity—the ultimate satisfaction of the acknowledged obligations of those subdivisions, the rights of their acknowledged creditors. This it did in 1856, in obedience to the mandate of its constitution, in accordance with the dictates of reason and justice.

In so doing, the State neither impaired, nor intended to impair the obligation of the city's contract, but merely exercised the undoubted privilege which it had and which its Legislature could not surrender, to obliterate from the statute book the partial enactment which—until then—had authorized the levy of a discriminating, unequal and unlawful tax. That was right; but it is evident—the city's liability existed before, did not arise from and has survived the repealed enactment.

A constitutional law, or any constitutional section of a law forms an inseparable part of a contract entered into during its existence; but, if any legislative act, or any section of an act which violates the Consti-

tution of a State, can be considered as part of a contract, it drags into it a lifeless form, an absolute nullity, which may and should be disregarded, which no court could justly enforce.

The power to enter into a contract and the exercise of that power, being inseparable from the corresponding duty and obligation to voluntarily execute it or suffer its legal enforcement, it is incontestable that under either a special statute, the general law, an express stipulation or an irresistible implication—an adequate remedy, inseparable from a conceded and acquired right, is—as the right itself—vested in the creditor, to require and compel a compliance with the contract.

I concur in the opinion and decree read by Mr. Justice MARR.

DISSENTING OPINION.

MANNING, C. J. I do not concur in the opinion of my brethren, and shall state the reasons of my dissent as briefly as the nature of the case will permit.

The main question is the alleged unconstitutionality of the 37th. section of the act of 1852, as violative of the constitutional requirement that taxation shall be equal and uniform. The argument is, that the legislative order to levy a special tax on real estate and slaves, (which last may be eliminated from our consideration now) and not on personalty, is a prohibited discrimination to the detriment of the former; and that the levy of any tax on an antiquated assessment, which does not represent the shifting values of a growing and ever changing city, is illegal, because unequal and not uniform. The relator meets this objection with a denial that the constitutional mandate refers to municipal taxation, and invokes the decisions of this court as supporting and maintaining the doctrine that reference was had to State taxes alone.

The leading case is Duncan's, 2 Annual, 182, where the Second Municipality had imposed a special tax of one per centum on all real estate within its limits, and the Court said, replying to the objection that it was unconstitutional because in conflict with art. 127 of the constitution of 1845:—"That article, by its very terms, applies to State, and not to municipal taxes. It provides for the equality and uniformity of taxation throughout the State. * * * The framers of this constitution had before them the condition of the municipalities of New Orleans, with their debts, their abuses, and their wants; and their corporate existence is recognized and continued as to certain public rights by an express provision. The jurisprudence under which the present system of taxation had grown up, was before them, and the power of remedying the evils of misgovernment was left in *statu quo* with the legislature, and

State ex rel. Southern Bank vs. Pillsbury, Mayor, et al.

the convention confined itself to providing for the State government, leaving the municipal bodies, as it is believed sound policy justified, under legislative control."

This judicial declaration is entitled to the greater weight from the fact that the then Chief Justice, who delivered the Opinion of the Court, was one of the framers of that constitution, whose provisions he was expounding. That decision was rendered in 1847, and although it is said, the case originated before the taxation clause of the constitution of 1845 went into full effect, the same court approved and re-affirmed it by name and in express terms in *Lafayette v. Cummins*, 3 Annual, 674, and *Bufington v. Dinkgrave*, 4 Annual, 549. These decisions were in 1848 and 1849, and the principle had become a rule of property when the consolidation act of 1852 was passed, and the bonds of the relator were issued. Nor is it unimportant to note in this connection that the courts of Virginia and Arkansas, whose constitutions contained an identical article with ours, ruled in the same way. *Gilkerson v. Frederick*, 13 Gratt. 577. *Washington v. the State*, 13 Ark. 351.

The constitution of 1852 reproduced this requirement touching the equality and uniformity of taxation, (art. 123) and in 1854 the court organized under that constitution had occasion for the first time to construe it. The doctrine of *Duncan's* case was abandoned, the court being divided in opinion. The Second Municipality had imposed a tax on the owners of real estate contiguous to Benton street, to pay the expense of opening it, and the court said, there was no other mode of apportioning a tax for such improvements which will be equal and uniform but that of an *ad valorem* tax on all property holders within the district, or by paying the expenses out of the funds derived from general taxation, and the tax on the real estate contiguous to the street was held invalid and unconstitutional. There were two dissentents, Slidell C. J. saying, he considered the decision in *Duncan's* case as settled doctrine, and no longer *res nova*. *White's* case, 9 Annual, 446. It is now said that the opinion in *Duncan's* case, so far as it treats of the constitutional mandate of 1845, is *obiter*. Slidell J. was a member of that court and concurred in the opinion, as did every member of that court, and after seven years of reflection, being also on the new bench, he was unable to discover in what respect it was *obiter*, and not only adhered to it, but declared, he did not consider the question any longer an open one.

It was not long however before the question was again presented broadly, and one of the two conflicting dicta had to be abandoned. In *Yeatman v. Crandell* XI Annual, 220, after quoting the article of the two constitutions, the court say;—"This article refers to State taxation in its proper sense, for general or State purposes. When it says that taxation shall be equal and uniform throughout the State, it points

directly to its object, which is to regulate the mode of filling the State Treasury. It does not take away the power of making local assessments for local improvements. * * * * It is notorious that an acre of land pays twice as great a tax for local purposes in one parish as an acre of equal value pays in another parish. Yet no one thinks the constitution infringed by such a state of things. It is enough that State taxes for State purposes are equal and uniform, and *ad valorem*."

White's case was thus overruled, and the doctrine of the earlier case was re-affirmed without dissent, one of the Justices who formed part of the majority in that case having renounced his former opinion and saying:—"I yield my former impressions on this point the more readily because the Supreme court which sat under the constitution of 1845, and five of the seven judges with whom I have sat upon this bench, have concurred in holding that the article in question was not intended to apply to municipal or local taxation for local improvements." The following year the decision in *Yeatman v. Crandell* was re-affirmed in *Jamison v. New Orleans*, 12 Annual, 346, and again in *Wallace v. Shelton*, 14 Annual, 498, in which last case the court say;—"When the different municipalities were consolidated into one city, the legislature adopted the principle that it was equal and just that the city at large should pay the very unequal debts of the different municipalities. It was not in the power of this Court to say that the legislation was unconstitutional."

There is therefore no doubt—there can be none—about the Judicial construction of the constitutional requirement of uniformity and equality of taxation. It may be argued that it was an erroneous construction, but that it was the actual construction, made by two courts interpreting identical articles in two constitutions, has been shewn by producing the language of those Courts. Nor can it be said that the question had not proper consideration. It was not settled without controversy, and the circumstances attending the decision in *Yeatman's* case impart great weight to the manner in which White's case was overruled, and evince the deliberation which attended the unanimous re-establishment of the earlier doctrine, that municipal taxation was not referred to, nor included in, the constitutional prohibition of inequality of taxation. And if so, then the 37th. section of the Act of 1852 is not open to the objection of unconstitutionality made by the defendant, because it deals with municipal taxation alone.

The action of the legislative department of the government was in accordance with this judicial construction. From the passage of the Act of 1852, the requirement for a levy of the tax to pay the interest on the Consolidated Bonds, was complied with. In 1856 the charter of New Orleans was amended, and the essential provisions of the act of 1852 were re-enacted, and those touching the levy and collection of this tax

were retained, and the assurances of its security and regular payment were renewed. The common council were directed to lay an equal and uniform tax upon all property real and personal in the city for the purposes of the Act—that is to say for the purpose of providing general revenues etc.—but said tax, *added to* the Consolidated Loan tax, and to certain other specified taxes, shall not exceed in the aggregate one dollar and fifty cents on one hundred dollars of valuation. Sess. Acts 1856, pp. 148, 162, secs. 42, 117. The manner of levying the tax for the Consolidated Loan, as fixed by the 37th. sec. of the Act of 1852, was not interfered with nor changed. That tax was to be levied as heretofore, and when added to the general equal and uniform tax which was to be levied on all property for other purposes, the aggregate was not to exceed a specified rate.

There was never a year when this Consolidated Loan tax was not collected, although the mode of its assessment was altered. In 1870 another charter was granted to New Orleans, and all the rights of the Consolidated Bond holders, secured to them by previous legislation, were recognized, and the collection of the tax for their payment was provided for. Sess. Acts 1870, pp. 44, 48 secs. 34, 44. And in 1874 the “validity of the consolidated bonds of New Orleans is recognized in all its integrity” by a solemn legislative declaration. Sess. Acts, p. 92. It was not until 1876, after the annual tax for the payment of the Consolidation Loan interest had been uninterruptedly laid for twenty years, that the General Assembly undertook to deprive the holders of the consolidated debt of all the means of procuring, or of enforcing payment of their bonds, or the interest upon them.

Meanwhile, in 1875, a suit had been instituted in the U. S. Circuit court by holders of the Consolidated bonds against the city, for the purpose of establishing their debt, and to compel a specific performance of the contract between themselves and the city, which they alleged grew out of and was contained in the 37th. sec. of the Act of 1852. They sought to have their position as creditors first in order, and entitled to preference in payment out of the taxes levied upon lands, determined by a decree of court. The unconstitutionality of the act of 1852 was pleaded by the city, but the Circuit court affirmed its validity, and declared that the 37th. section constituted a contract between the City and the Consolidated bondholders, which could not be impaired, and that the City was liable to those bondholders for the sums collected under it. The decree in that case is pleaded by the relator as *res adjudicata* in this. It is not necessary that I should pass upon that plea, as I am considering the defence as an original question.

In 1876 the act was passed, upon which the City relies to justify it in refusing or neglecting to levy the tax required by the act of 1852.

State ex rel. Southern Bank vs. Pillsbury, Mayor, et al.

Sess. Acts, p. 54. It prohibits the assessment or collection of any tax for the payment of any bonds, or interest of any bonds, except those styled Premium bonds of the City, and repeals all previous laws which required or authorized the council to levy any tax for the payment of any other bonds. It deprived the Consolidated bondholders by one stroke of all process for the enforcement of their alleged contract with the city, and annihilated the security which the terms of that contract assured to them. No tax has since been levied to pay the interest on their bonds, or to redeem any portion of them. If the General Assembly had constitutional authority to make that enactment, the relator is remediless. If otherwise, the Act of 1852 is binding upon the city.

What was the effect of the act of 1852 *quoad* the Consolidated bondholders and the State? Was there a contract made thereby between them, and if yea, can any subsequent legislation invalidate it? There is no distinction between a contract of a State and a contract of an individual, and a contract which a corporation makes under authority of the State is in the same category. The engagement which the City of New Orleans made, was to pay the Consolidated Bonds which were to be issued in lieu of the previous obligations of the old City, and the three Municipalities, and of Lafayette; and she stipulated as security for the performance of this engagement that a certain and specified sum should be raised by taxation each year, to be applied to the payment of the coupons, and the partial extinguishment of the principal, and as a further guaranty, the legislature in advance pronounced the nullity of all ordinances, resolutions, or other acts which the Council might pass until the ordinance imposing the Consolidation loan tax should have been adopted. This engagement was accepted by those who held the old obligations, and an exchange was effected. Here then was a contract made by a public corporation, under express authority of the legislature, with its creditors, who assented to it by perfecting the arrangement the legislature had in contemplation. A learned author lays down the rule controlling the rights of these contracting parties, and the obligations resting upon them thus;—"when under the exercise of powers delegated, the rights of third persons have accrued, and they have assumed the form of a contract with the municipal corporation, the legislature cannot change the powers of the corporation so as to impair the rights of its creditors. The Constitution of the United States prohibits any law impairing the obligation of contracts, and while the legislature may alter or modify the powers of the subdivisions of the State, such alteration cannot be allowed to affect the creditors of the subdivisions. They are entitled to claim that the corporation shall exercise such powers as it had at the time this contract was made." *Burroughs' Taxation*, 427. And yet more, the rights of these creditors cannot be successfully im-

pugned by the judiciary any more than by the legislature, for the Supreme Court of the United States holds that when the Courts of a State have decided that Bonds issued by a corporation are valid, if the Courts of that State subsequently reverse that decision, and declare that the Bonds are void, because the legislature had not the power to authorize their issue, then the rights of the holders of bonds issued during the time when the courts of the State held them valid are not affected by the subsequent adverse ruling that they were invalid. *Gelpcke v. City of Dubuque*, 1 Wall. 175. *Havemeyer v. Iowa Co.* 3 Wall. 294. *Lamson's case*, 9 Wall. 477.

In *Van Hoffman v. City of Quincy*, 4 Wall. 535, the Court say;—"it is clear that where a State has authorized a municipal corporation to contract, and to exercise the power of local taxation to the extent necessary to meet its engagements, the power of taxation thus given cannot be withdrawn until the contract is satisfied. The State and the corporation in such cases are equally bound. The power becomes a trust, which the donor cannot annul and which the donee is bound to execute, and neither the State nor the corporation can any more impair the obligation of the contract than any other."

In *Smith v. Appleton*, 19 Wis. 495, that court, construing an act very similar to our act of 1852, under which new bonds had been issued to take the place of, and to be received by creditors, in the stead of old bonds, observed that the stringent provisions of the act to secure the payment of the interest "were obviously introduced to induce creditors to surrender their old bonds, and accept the new. These provisions, when accepted by the creditors and the city, and the new bonds were issued, constituted a most material element of the new contract. They entered into and became a part of it, and as such, are not the subject of legislative repeal or amendment, so as to impair the right or diminish the security of the creditors without their assent."

And the same principle applies to this case. In my opinion, the city entered into a contract with the holders of the bonds, the surrender of which she was inviting, which became complete when they exchanged them for Consolidated bonds. This contract is contained in the 37th. sec of the act of 1852. The contemporaneous construction of the Courts was, that the provisions of that section relative to the taxation upon real estate was not a violation of the constitutional requirement of uniform and equal taxation, and therefore the legislature could not afterwards withdraw the power of taxation thus conferred for the benefit of those bondholders until the contract was satisfied, nor can the judiciary ignore its own previous and contemporaneous exposition and determination of the rights which parties have acquired under the contract to their detriment. The contract cannot be affected by any subsequent decision alter-

ing the construction of the law. Gelpcke's case, 1 Wall. 206. "If the contract, when made, was valid by the constitution and laws of the State as then expounded by the highest authorities whose duty was to administer them, no subsequent action of the legislature or the judiciary can impair its obligation." *Havemeyer v. Iowa Co.*, 3 Wall. 294. Whatever views I may entertain of the soundness or unsoundness of the construction placed by this court upon the articles of the Constitutions of 1845 and 1852, relative to equal and uniform taxation, it is sufficient to say here that that question cannot be re-opened to the prejudice of the bondholders. Their rights are protected by the adjudications of this Court, which through a long series of decisions (with a single interruption), declared that municipal taxation was not in the contemplation of the Constitution, when it prescribed the rule of equality and uniformity, and therefore the 37th. section of the Act of 1852 is a valid enactment. The language of the U. S. Supreme court in *Van Hoffman's* case may be literally applied to this, changing only the date of the act under consideration;—"The laws, requiring taxes to the requisite amount to be collected, in force when the bonds were issued, are still in force for all the purposes of this case. The act of 1863 (in our case, the act of 1876) so far as it affects these bonds, is a nullity. It is the duty of the city to impose and collect the taxes, in all respects, as if that act had not been passed. A different rule would leave nothing of the contract, but an abstract right of no practical value, and render the protection of the constitution a shadow and a delusion." 4 Wall. 555.

The inequality of the taxation upon the assessment of 1851 has been very vividly portrayed by the counsel of the city. At that time a large portion of what is now the most beautiful part of the city was unimproved. Streets, that then were considered the most desirable locations for the large commercial houses, have been surrendered to baser uses. On opposite sides of the same street the operation of the tax was unequal. This inequality has been demonstrated by a tabular statement of one of the counsel for the intervenors, which shews that in the fourth district the tax is less than one half that in the third.

If however it was the settled jurisprudence of this State, when the Consolidated bonds were issued and received in exchange for old obligations, that the article of the Constitution requiring uniform and equal taxation, had reference to State taxation alone, the rights of these bondholders cannot be affected by a change of opinion of the judiciary upon that question. Nor can the legislature disregard, ignore, or impair the contract which was made between the city and the bondholders. The rights of the bondholders were secured and set forth in the contract. The power of the legislature to make the provisions, which constituted their security, was judicially declared to be within the authority of the

State ex rel. Southern Bank vs. Pillsbury, Mayor, et al.

Constitution, and it is too late now to attempt to deprive the bondholders of the guaranty which every department of the Government gave them, that they held a just debt, amply secured, and which should be paid in the manner stipulated by their debtor.

Writ of error granted to the Supreme Court of the United States.

No. 6963.

SUCCESSION OF R. J. ELLIOTT, LEWIS AUSTIN, TUTOR, vs. MRS. M. E. ELLIOTT, ADMINISTRATRIX.

If it appears that the special mortgage given by the tutor in favor of the minor in order to release the general legal mortgage on the tutor's property was based on an homologated account of the tutor that was false and fraudulent on its face, the giving of the special mortgage, and the release of the general mortgage in the minor's favor, although sanctioned by advice of a family meeting and a decree of court, will be held null and void, not only as against the tutor's succession, but also as against any creditor of his cognizant of the fraudulent character of the homologated account.

The legislation of 1869 requiring all mortgages to be recorded in the same book did not require mortgages already legally registered to be re-recorded.

The vendor of land may acquire a legal mortgage on the land by virtue of recorded judgments against his vendee.

If the widow, or any one of the minors, possess in his or her own right \$1000, nothing can be allowed under the homestead law.

The failure of the Recorder of Mortgages to register with the private contract formed by a furnisher of supplies with the planter, the proof of its execution, will not impair the privilege acquired by the record of the contract.

Fees due physicians for professional services during the last illness can not be ranked as privilege claims unless duly recorded.

A PPEAL from the Parish Court of East Baton Rouge. *Sherburne, J.*

Sam'l P. Greves for Austin, tutor, appellee.

Herron, Bird & Beal for administratrix, appellee.

Favrot & Lamon and *G. W. Buckner* for Newell, appellant.

The opinion of the court was delivered by

SPENCER, J. R. J. Elliott was twice married. By this first wife, Edith Austin, he had one child, William. Edith died in 1864, leaving as sole heir said child then and yet a minor. At the death of his said wife, Elliott owned in community with her the plantation (near Baton Rouge) about which this controversy in part relates. In 1868 Elliott qualified as natural tutor of his said child, and Jeff. Thomas was appointed under tutor.

During the marriage between Elliott and his deceased wife, he received of her paraphernal funds, from the estates of her father and brother, \$3961 75.

In June, 1868, Thomas, the under tutor, proceeded against Elliott,

tutor, for an account of tutorship, alleging that Elliott was embarrassed and the minor's rights endangered. The account was rendered, and exhibited the above amount, \$3961 73, as due the minor in money, and estimated the community property (the plantation) at \$5000; of which one half belonged to the minor. No debts were stated against the minor or community. This account was homologated and made the judgment of the court. This judgment of homologation was recorded as a judicial mortgage. The claims of the minor were also duly recorded as legal mortgage prior to January 1, 1870.

Thus matters stood until Feb., 1872, when Elliott applied to have the minor's interest in the community property, i. e., the plantation, adjudicated to him under Art. C. C.

The plantation was valued by experts, and on the advice of a family meeting the minor's share of said property was adjudicated to Elliott at \$1000, with reservation of special mortgage, etc.

On Feb. 28, 1872, Elliott applied for leave to give a special mortgage to the minor, under Art. C. C. He accompanied this application by an account of tutorship, filed Feb. 28, 1872, crediting the minor, as before, with paraphernal funds of the mother, \$3961 73, and 5 per cent interest thereon; also with \$1000, the price of the adjudicated community property. But he now claimed credit for large sums paid by him on community debts, which by said account were fixed at \$6662 49, one half to debit of minor being \$3331 24. This sum together with the sum of \$1083 40 for law charges, expenses of minor, etc., amounted to \$4414 66, thus leaving balance in favor of minor of only \$1286 52.

The under tutor, promptly, on the day this account was filed, answered "that he had no objection to its homologation; that having carefully examined it and the accompanying vouchers, and believing the same correct," he joined in the prayer for its homologation.

It was on next day homologated, and the sum of \$1286 52 fixed as the amount due the minor. No proof beyond the vouchers was administered as to these alleged community debts. A family meeting was convened and experts appointed to pass upon the sufficiency of the property offered to be specially mortgaged by the tutor. The report and deliberations represented it as ample. Thereupon the court authorized the special mortgage to be given by the tutor, and ordered and decreed the erasure and cancellation of all other mortgages of the minor.

The property thus specially mortgaged was a lot of 125 acres, constituting part of a tract of 327 acres bought by Elliott of J. A. Payne on Feb. 28, 1872. Elliott paid for the whole 327 acres only one thousand dollars. This purchase was made on the very day he applied for and obtained authority to specially mortgage 125 acres of it, to secure \$1286. This 125 acres he got valued at \$2000. The evidence in this rec-

Succession of Elliott.

ord satisfies us that \$500 would have been an over valuation of it at the time, and there existed on it two prior judicial mortgages in favor of J. A. Payne for more than its value, as we shall see.

Having executed the special mortgage to the minor on March 8, 1872, Elliott on the same day mortgaged to Henry Newell, for a loan of \$8000, the plantation, the minor's one half of which he had caused to be adjudicated to himself a few days before for \$1000.

After these transactions, Elliott died, and Lewis Austin became tutor of the minor William, and Mrs. M. E. Elliott (the second wife) became administratrix of the estate of her husband, who left a minor child, issue of this second marriage.

Lewis Austin, tutor, brought suit to annul these transactions and to reinstate the minor's rights above described. Mrs. Elliott filed an account of her administration, proposing a distribution of the funds and estate in her hands.

That suit of Austin, tutor, and the oppositions to the account of administratrix were consolidated and tried together. The appeals from the judgment therein are the matters before us. The issues are numerous and some of them important. The principal questions presented are :

First—Are the proceedings herein before detailed, whereby the minor William's interest in the community was adjudicated to his father, and whereby his legal and other mortgages were canceled by substitution of a special mortgage, valid and binding on him ?

Second—If not binding as between himself and the estate of his father, how far are third persons protected by the decrees in said proceedings, when they have dealt with the tutor on the faith thereof and *bona fide* ? Was Henry Newell the holder of the \$8000-mortgage, in good faith ?

Third—Did Payne, who was a creditor by judgment duly recorded in 1868 of Elliott acquire a judicial mortgage on the property (327 acres) sold by him to Elliott, for cash, in 1872 ?

Fourth—Where the husband dies, leaving a minor child of his first marriage, possessing more than \$1000, but also leaves a minor child and widow of his second marriage in indigent circumstances, can the latter claim the homestead of \$1000 ?

Fifth—What is a sufficient registry of a private act of mortgage or privilege ?

Lastly—Does the physician's bill for last illness require to be registered, to preserve its privilege ?

1st. As regards the adjudication of the community property to the father, the only objection that seems to have any force is that the price was inadequate. The property in 1868 was inventoried at \$5000, and

one half of it at \$1000 in 1872. True, this was a heavy depreciation, but not greater than was experienced in many other localities in this State during these sad and long-to-be-remembered years.

We can not from this fact alone draw the conclusion that there was a fraud-intent conspiracy between the tutor, under tutor, experts, and family meeting.

But the proceedings for substituting a special for the legal mortgages held by the minor have a very different aspect.

On the 28th Feb., 1872, the tutor buys 327 acres of land for \$1000. He stated to the vendor that he bought it for the purpose of mortgaging it to his ward and releasing his other property, so that he could give Newell a mortgage on the latter. On this same day, Feb. 28, he formally petitions for authority to execute the special mortgage, and proposes to grant it on 125 acres of this thousand-dollar tract. He convenes a family meeting composed of only two relatives and three "friends" of the minor, when there were a number of near kinsmen within thirty miles of Baton Rouge. Two of this family meeting act as experts and report to themselves and the other members that those 125 acres were worth \$2000, although they were bought that day at about three dollars per acre, as shown by the title before the meeting. The mortgage certificate before them showed judicial mortgages to amount of several hundred dollars bearing on this land. We can not believe that they were sincere in their conclusions that the security was ample, even to secure \$1286. But the most extraordinary feature of this proceeding was the account of tutorship rendered on *the same day* and promptly approved by the under tutor. We do not think that the provisional account rendered in 1868 precluded and estopped the tutor from showing, in subsequent accounts, that he had paid debts of the minor, and claiming credit therefor. But the account rendered on Feb. 28, 1872, was false, fraudulent, and illegal on its face. Thus the largest item in it reads:

"Paid Dec. 3, 1863, to N. K. Knox, for note to him and claims transferred by Col. Matta, these debts contracted in 1860 and 1861, \$2712 49."

Here was a debt alleged to have been *contracted during the existence of the community, and paid during its existence*, (for the wife died in 1864!) yet charged to the minor as a debt of the community paid after its dissolution.

The next largest item of credit is \$2500, the amount of a note of Elliott's, dated June 23, 1866. There was not a scintilla of proof that this note given in 1866 was for a debt contracted before the wife's death in 1864.

This account was homologated *and made the judgment of the court.*

This account therefore constituted *the basis* of the proceeding to give the special mortgage, for it was *of the essence* that there should be an ascertainment of the amount for which this special mortgage was to be given. We think that the fraudulent character of this account and its falsity were patent on the face of it, were exhibited by *its own statements and so-called vouchers*.

2nd. There can be no dispute at this day as to the entire correctness of the proposition that third persons dealing *bona fide* are protected by final decrees rendered by courts having jurisdiction of the persons and subject matter before them, and this whether said judgments be right or wrong, honest or fraudulent. But the question here presented is, can a man be *bona fide*, where the very decree under which he seeks shelter bears upon its very front the brand of falsehood, fraud, and illegality? Here was a decree which by its own enunciations disclosed that the credits claimed were false and untrue. More than this, here was a decree which upon its face, under pretext of paying community debts, stripped a minor of his patrimony, inherited from his mother as her paraphernal estate. His mother died having a separate paraphernal estate. Her death devolved this separate estate upon her infant son, and dissolved what is now charged to be an insolvent community. Where is the law which authorized this child's father and tutor to make this separate estate of the minor liable for community debts, and to swallow it up, under pretext of paying them? Where the community is dissolved by the death of the wife, her minor children can not be made liable for the community debts beyond the value of the community property. The minor himself can not accept the community, nor has the tutor the power to do so to the injury of the minor. If such power exists (which we gravely doubt) it would be in the probate court upon the advice of a family meeting.

Newell lived in Baton Rouge, where these things were being done. He had the same attorney as had Elliott, tutor. When Elliott bought the property from Payne, he said it was done in order to clear his other property for Newell's benefit. All these proceedings for divesting the minor's mortgages were hurried through in a day or two, and at once followed by the mortgage to Newell. We are impressed with the belief and conviction that Newell was cognizant of every step in the proceeding and interested in the event. The judge *à quo* so thought, and we think his conclusion fully justified.

We therefore hold that the proceeding whereby the community property was adjudicated to Elliott must be maintained; but that the proceeding to release the minor's mortgages by substitution of the said special mortgage is without effect and void, both as to the estate of Elliott and his creditors. The account of Feb. 28, 1872, must be set

aside as fraudulent and illegal; and the minor's mortgage, for such sum as may be found due him on a final account of his tutorship, to be rendered by the administratrix of Elliott, must be recognized as being first in rank on all the real estate of the deceased. It is manifest that neither the account of 1868, nor that of 1872 (being both provisional) can be resorted to as establishing the amount due the minor, for the tutor may after their dates have lawfully expended moneys for which he must have credit.

3d. We see no room to doubt that the Payne judgments are as mortgages prior in rank to the special mortgage of Newell. They were recorded five years before it, in 1868, in the Book of Judicial Mortgages. The legislation of 1869, requiring all mortgages to be recorded in the same book, did not require mortgages already legally registered to be re-recorded.

That law provided for the future. Nor is there any force whatever in the proposition that Payne as vendor of the 327-acre tract could not without breach of warranty acquire a mortgage thereon by operation of his recorded judgments. What prevented his previously obtained judgments attaching to the property sold by him as soon as that property belonged to his debtor? Payne's warranty was that the property was free of mortgages imposed upon it by himself or previous owners, not that he would not acquire a mortgage on it.

4th. As to the widow's and minor's right to the \$1000-homestead. The claim is based on Art. 3252, Civil Code:

"Where the widow, or minor children of a deceased person, shall be left in necessitous circumstances, and not possess in their own right property to the amount of one thousand dollars, the widow or the legal representatives of the children shall be entitled to demand and receive from the succession of the deceased husband or father a sum which, added to the amount of property owned by them, or either of them, in their own right, will make up the sum of one thousand."

It is now elementary that laws of this class must be strictly construed and can not be extended by implication or construction. If the widow, or any one of the minors, or all of them together, possess in their own right \$1000, nothing can be allowed, even if some of them have nothing. This is the spirit of the adjudicated cases, and is, we think, correct doctrine. See *Stewart vs. Stewart*, 13 A. 398. *McCall vs. McCall*, 15 A. 527, 25 A. 535, 26 A. 615.

As our decree gives the minor William, in his own right, a sum exceeding that amount, and recognizes a first mortgage to secure it, this precludes the allowance of \$1000 to the widow and the other minor.

5th. The lien and privilege of Newell on the proceeds of the crop of

Succession of Elliott.

cotton, raised in 1874, to the extent of his recorded supply contract, \$1500, is we think fully established and should have been allowed.

The objection that the recorder did not register with the contract the proof of its execution is immaterial. It was a private act. The object of registry is notice, and that was fully effected by the registry in this case. Whatever may be the law as to registry of sales, the Code is explicit as to mortgages and privileges.

Art. 3367 expressly provides that mortgages under private signature may be registered, without previous acknowledgment by party or proof by subscribing witnesses, where the recorder on his own responsibility and knowledge is willing to do so.

It is unnecessary to discuss the question as to the effect of Newell's sequestration of the cotton prior to Elliott's death. We may remark, however, that sequestration gives no privilege. It issues on and secures privileges already existing. It is otherwise with attachments and seizures under *fi. fa.*

6th. The claim of A. Rosenfield should be as a privilege reduced to \$21 75.

7th. The physicians' bills—to wit : Dr. Dupree \$690, and Buffington \$250, allowed by administratrix as privileged expenses of last illness, are opposed as excessive, and as having never been registered and therefore not to be allowed as privileges. The accounts though large, are fully proven to be at customary rates. The Civil Code declares that *no privilege shall have effect as against third persons unless duly recorded.* Art. 3274, C. C.

However unreasonable this provision is when applied to cases like this, still *it is the law*, and is binding on this court. We know no law excepting or exempting such claims from the necessity of this registry. These claims can not be ranked therefore as privileged. We apprehend that claims which arise *after the death* of a party, and in the administration of his estate, and which the law classes as privileged, need not be recorded, since registry is without effect, after decease; and by giving the privilege under these circumstances the law manifestly intends to exempt them from registry. See, also, R. C. C., Art. 3276, so providing.

8th. McCabe's bill should be allowed as a privilege only for \$20, his wages during the time he acted as a domestic servant.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be amended as follows :

1st. The account of tutorship filed by Elliott, tutor, on Feb. 28, 1872, and the decree homologating the same are set aside and annulled; the proceeding, orders, and decrees granting permission to Elliott, tutor, to give the special mortgage of March 8, 1872, to his ward, and canceling the said ward's previously acquired mortgages, are also set aside

Succession of Elliott.

and annulled, and the said previous mortgages of said minor are re-instated in full force, and declared to be first in rank on all the real estate of said Elliott to secure the payment of such amount as may be ascertained on final account of tutorship to be due him.

2d. The opposition to the widow's claim for \$1000 is sustained, and said claim rejected.

3d. The claim of Newell to be placed as a privileged creditor on the proceeds of the crop of 1874 is sustained to the amount of fifteen hundred dollars.

4th. The opposition to account of A. Rosenfield is sustained, and his claim as a privilege reduced to \$21 75.

5th. The opposition to the claims of Dr. Dupree and Dr. Buffington is sustained in so far as relates to the privilege of said claims, but not otherwise.

6th. The claim of McCabe as a privilege is reduced to \$20.

It is further ordered that as thus amended said judgment be affirmed, and this cause is remanded for the sole purpose of having the amount due the minor William, Elliott, ascertained, in accordance with the law and the views herein expressed. The costs of this appeal to be paid by the succession.

Rehearing refused.

No. 7180.

JOSEPH SWAN VS. GEO. VOGEL ET AL.

A recorder of mortgages can not deprive a mortgagee of his rights under a recorded mortgage by omitting it from the index, or by indexing it improperly, or by omitting it from his certificate.

Where a widow makes two mortgages in favor of different parties, and is described in each as the widow of a person with the same given name, and whose family name is only spelled differently in the two mortgages by the transposition of two letters, the identity of the mortgagor is sufficiently indicated in each.

A PPEAL from the Fifth District Court, parish of Orleans. *Rogers, J.*

A. J. Lewis for plaintiff and appellant.

John & C. B. Ray and *Jerome Meunier* for defendants and appellees.

The opinion of the court was delivered by

MANNING, C. J. In September 1873 Katharine Sier, widow, executed her note for six hundred dollars with eight per centum interest from maturity, payable one year after date. At the same time she gave a mortgage to the defendant Vogel to secure its payment on two lots in this city. Both the note and mortgage are signed by her as written

above, but her name is written by the notary Katharina Kramer widow of Bernard Sire.

In May 1876, she executed her note to the plaintiff Swan for \$1,380.00, and secured it by mortgage on one of the same lots. This note and mortgage were signed by her in the same way as the others, and the notary describes her as Katharina Kramer widow of Bernard Sier. The signatures to both of the notes, and both of the mortgages, are the same. The notary in the first mortgage has written her name *Sire*, and in the second *Sier*. Both mortgages were recorded on the day they were executed.

Swan foreclosed his mortgage in Oct. 1877, and on the 19th. of that month bought the mortgaged property at sheriff's sale. The certificate of the recorder of mortgages, furnished and read at this sale, made no mention of the Vogel mortgage, and the Swan mortgage was certified as the sole incumbrance on the property, except the drainage and other city taxes.

A few days after this sale, Vogel took out executory process to foreclose his mortgage, and it was enjoined by Swan. That is the present suit. The grounds of injunction are, that Vogel and Mrs. Sier fraudulently concealed from Swan the existence of the Vogel mortgage, and that he could not obtain information from the mortgage office of its existence because it was not inscribed therein in her real and proper name *Sier*, but in another and different name, viz *Sire*, and that the certificate of the recorder could not be otherwise than it was, as Swan's mortgage was the only one resting upon the property of widow Sier.

The testimony does not sustain the allegation of concealment. Kuhn, a witness, says he spoke to Swan at the sale about the Vogel mortgage, and Kramer swears that Swan knew of it shortly after its execution, and before the date of his own mortgage, while Mrs. Sier states that she told Swan of it the day she executed it. Swan is her son in law, and at that time she lived at his house. They have since quarreled. She also states that she received only two hundred dollars from Swan for her note of near fourteen hundred dollars, while Swan swears that he paid her, or paid for her, \$525 at one time, and \$800 at another. We attach no importance to that feature of the case.

Mr. Onorato, the deputy sheriff who made the sale, says he read the recorder's certificate aloud, and some one mentioned that there was a mortgage upon the property previous to Swan's, and he remembers Mr. De Armas another deputy who was present replied, if there was one, it was not inscribed, or if it was inscribed, the recorder had omitted it in his certificate.

Mr. Richardson, the deputy of the recorder of mortgages, says the sheriff asked him for a certificate of the mortgages against Katherine

Kramer, and that in one record she is described as the widow of Bernard *Sier*, and in the other as *Sire*, and he certified the existence of the former—that these two mortgages are indexed in these names, but if there had not been an error in the “research,” the Vogel mortgage would have appeared on the certificate. It appears that when a search of the mortgage records is made for the purpose of giving a certificate, a memorandum is made of the mortgages appearing against the name of the mortgagor, and these memoranda, which are known in the office as “researches,” are preserved. So that afterwards when another certificate is wanted of mortgages recorded in or against that name, reference is had to the “research” to ascertain what mortgages were recorded up to that date. The witness says, there was an omission in the “research” in the present instance, which had been made by another and former deputy, and that he discovered that omission after the sale. Of course he must refer to the Vogel mortgage as the omission, since that was the only one besides Swan’s.

The counsel for the plaintiff insists that the law requires an index of the mortgage books to be kept, and the recorder is, and must be guided by that in preparing the certificate. But that would be substituting the index to the mortgage, and is tantamount to saying that although the mortgage may be recorded in the proper book, it is of no avail if not indexed. The index is ordered by law to be kept for convenience, but it is not a part of the mortgage record. Certainly it does not take the place of the record in the book, and supersede it.

There was enough in the mortgages as recorded to indicate the identity of the mortgagor in each. In both of them she was described as Katherina Kramer, widow of a man whose first name was Bernard and whose family name was spelled differently only by the transposition of two letters. The deputy recorder, who gave the certificate, impliedly admits that if the mortgage book had been consulted instead of the “research,” this identity of description would have caused him to put the Vogel mortgage on the certificate.

But the real question is, can the recorder deprive a mortgagee of his rights under a recorded mortgage by omitting it from the index, or by indexing it improperly, or by omitting it from his certificate? It is unnecessary to say that he cannot. Vogel’s mortgage was recorded. The property was described in it. A part of it was the same as that mortgaged to Swan. The name was mentioned with descriptive particularity, and Vogel cannot lose his rights under the mortgage because of a mistake in the officer who gave the certificate.

Independent of this, Swan knew of the prior mortgage. The remark made by a bystander at the sale, and the reply of the officers making the sale, must have reminded him of the fact, of which he had

Swan vs. Vogel et al.

been apprised before, i. e. that there was a previous mortgage, and Vogel held it. He bought with his eyes open.

We have not noticed another ground of the injunction, that all interest had been paid on Vogel's note up to October, 1878, and its payment had been postponed till then, because it is not proven, or rather it is disproved.

The defendant prays for damages. We do not feel inclined to inflict them. Swan's injunction does not appear to have been wantonly provoked, and the probabilities are that he will lose his debt. The lower judge dissolved the injunction with costs only.

The judgment of the lower court is affirmed.

No. 7030.

JAMES L. COLE VS. THOMAS LA CHAMBRE ET AL.

Under the act of Congress passed in 1875 a suit can not be removed from a State to a Federal Court, after the case has been twice fixed for trial in the State court at two different sessions of said court.

A continuance will not be allowed on account of the absence of evidence to be taken under a commission, when it appears that the party who applied for the commission was dilatory, and neglectful in taking it out.

The absence of a witness will not warrant a continuance when it appears that the order to summon was given by plaintiff only two days before the trial, and that defendant offered to admit that the absent witness would, if present, testify as stated by plaintiff.

An obligation which was valid when incurred can not be impaired by any amendment of the constitution of the State.

A homestead can not be located on land held in indivision.

A mortgage on land in existence before the enactment of the homestead law is not affected by that law.

It is not necessary to prove a mortgage, as to defendants against whom a formal judgment has been rendered expressly recognizing the mortgage.

A PPEAL from the Fifth Judicial District Court, parish of Iberville.
McVea, J.

Barrow & Pope for plaintiff and appellee.

Hewes & Parlange for defendants and appellants.

The opinion of the court was delivered by

DEBLANC, J. In May, 1867, Ernestine—the daughter of Henriette Lauve and of A. N. Cropper, the first husband of the said Henriette Lauve, obtained judgment—in the 5th district court of this State—against her mother and James L. Cole, her mother's second husband, for \$14,727.53c, with eight per cent interest thereon from the date of said judgment.

That amount represents the said Ernestine's inheritance from the

succession of her father, and is secured by the legal mortgage which the law gives to widows, and which—according to the terms of its recognition in the decree of May 1867, bears on the property of Ernestine's mother—as her tutrix, and of James L. Cole, as her co-tutor, since the 18th of August 1855.

On the 7th of July 1870, Ernestine Cropper, then the wife of E. D. Woodlief, transferred said judgment to William T. Gay, who—on the 30th of September 1871—was recognized, by a decree of the 5th district Court of the State, as transferee of said judgment, and who—on the 7th of June 1872—subrogated Thomas La Chambre & Co. to all the rights which he had acquired from said Ernestine Cropper, and against James L. Cole, his wife and their property. Of this last mentioned subrogation, the commercial firm of L. Grand & Co., to whom—on the 16th of April 1870—the said James L. Cole had sold the undivided half of a plantation subject to the legal mortgage of Ernestine Cropper—took express cognizance by the intervention of one of its members in the act of subrogation and waived all future notice of the same.

On the judgment then transferred to them, the said Thomas La Chambre and Co. caused a writ of *feri facias* to issue out, and under the seal of the 5th district Court, and—under that writ—the sheriff seized the plantation, one half of which James L. Cole has sold to L. Grand & Co, and the whole of which is subject to the legal mortgage, securing the transferred judgment.

This seizure was made by the sheriff and enjoined by James L. Cole and his wife, in the month of May 1877: their injunction is based on the grounds:

1. That said judgment having been rendered by virtue of the probate jurisdiction of the late Fifth Judicial District Court of Iberville, as organized under the constitution of 1864, in a suit between minors and their tutrix and co-tutor in a matter appertaining to the tutorship of said minors, was, by the constitution of the State of Louisiana adopted in 1868, and the laws passed subsequent to said adoption transferred to the Parish Court of the Parish of Iberville, which alone, under said constitution, has jurisdiction of said suit, and which is the successor of the late Fifth Judicial District Court, so far as same exercised probate jurisdiction, and particularly in all suits for the settlement of accounts between tutors and minors. That the writ issued out of the Fifth Judicial District Court and is attested in the name of the judge and bears the seal of the said court, when, if any writ could issue on the said judgment, which they deny, it should have issued from the parish court and should be attested by the parish Judge and bear the seal of said parish court.

2. That the judgment on which said writ of *feri facias* issued, was

at the time same issued and is now prescribed, no party interested in said judgment having had a citation issued according to law, to defendants from the court which rendered the judgment within the ten years from the rendition thereof.

3. That the active mass of the account of tutorship on which said judgment was rendered, was composed of partly the price of the plantation seized and partly the price of slaves, and that—under the actual Constitution of the State—a contract for the sale of persons can no longer be enforced by our courts.

4. That—of the property seized by the sheriff—the law exempts from seizure one hundred and sixty acres of land, the buildings thereon occupied as a residence, one work horse and one wagon or cart.

Defendant's answer was filed on the 19th of July 1877, and—on the 21st of January 1878—plaintiffs presented an application to have this cause transferred to the circuit court of the United States. Their application was overruled, their injunction tried and dissolved and their demands rejected; but defendant's claim for damages was not allowed, and—on that ground—they have appealed from the decree of the district court.

I.

Were plaintiffs entitled to the removal of their injunction from the State to the federal court?

Without her sovereignty and its attributes, a State would soon be reduced to the condition of a province, and of all those attributes—the most important, by far, is her judicial power. The federal enactments which, as a necessity of our form of government, encroach upon and lessen the integrity of that power, should not be enlarged by any mistaken interpretation of the State Court.

The 3d Section of the congressional act of March 3d, 1875, provides that "whenever the plaintiff or defendant shall desire to remove any suit of a civil nature—at law or in equity—from the State to the federal court, he or they may make and file a petition in such suit in the State Court *before or at the term* at which said cause *could be first tried*, and before the trial thereof, for the removal of such suit into the Circuit Court to be held in the district where such suit is pending."

Plaintiffs' injunction was granted on the 31st of May 1877, the answer to the injunction filed on the 19th of July of that year, and the application for a removal presented six months and two days after the filing of the answer, when the case had twice been fixed for trial in the State Court, the first time for the 26th of July 1877, and the second time for the 21st of January 1878, after plaintiffs had obtained from said court an order for the issuance of a commission to take evidence, after they had asked and been denied a continuance of this case.

In the language of the Supreme Court of the United States, and of our State, an injunction is but a graft upon, and not a proceeding independent and separate from an already existing and original action. They are, in almost every instance, inseparable twins: but, were it otherwise, this case—whatever it may be—an original or ancillary proceeding, could have been tried at the term of the 5th district court held in July 1877, and it was too late to attempt to remove it at the subsequent term, after the jurisdiction of the court had been—not only accepted by the plaintiff—but resorted to, chosen and used by them, after authority had been invoked to procure evidence for a trial which appears to have been twice fixed without objection.

29 A. 372—30th A. 1, and cases therein referred to.

II.

The motion for a continuance of this case from the January term held in 1878 to its next term was properly refused: the order to issue a commission to take evidence in France was made in July 1877, and that commission was not applied for before the 17th of December; under these circumstances, the fact that it was not returned in January 1878, did not constitute a good ground to postpone the trial. Had the evidence which was to be taken under that commission been of any importance to plaintiffs, they would not have neglected during four months to procure and forward it.

The district judge did not err in refusing to continue the case, on account of the absence of witnesses, to summon whom to appear on the 21st, plaintiff's order to the clerk was only given on the 19th of January, a Saturday—when the trial had been fixed since the 10th of that month; and besides defendant's counsel had offered to admit that, if present, the witnesses mentioned in the affidavit for a continuance, every one of whom was then absent from the parish, would testify as stated by plaintiff.

III.

The objection that the parish court alone could have issued execution on the judgment rendered by the 5th district court, was passed upon and determined in case No. 7048 of the docket of the Supreme Court, entitled *Thomas La Chambre & Co. vs. Henriette & J. L. Cole*, decided in April last. That decision also disposes of the plea of prescription opposed by plaintiffs in injunction to the judgment sought to be executed by the defendants.

IV.

To discover that the account of tutorship from Mrs. Cole to Ernestine, a child of her first marriage, includes the price of slaves, we would have to look beyond two judgments, that rendered in favor of the said Ernestine, in May 1867, and that of September 1871, by which William

Cole vs. La Chambre et al.

T. Gay was recognized as the transferee of said last mentioned judgment. That discovery made, we would certainly hold—as did the Supreme Court of the United States, that—when incurred—the obligation of Mrs. Cole and of her husband, the first as tutrix and the other as co-tutor—was a valid obligation, and that the constitutional provision which declares its nullity and forbids its enforcement, is in violation of the federal constitution.

13 Wallace, 646—25th A. 349, 350.

V.

For two reasons, the claim for a homestead cannot be sustained :

1. J. L. Cole is but a part owner of every acre and fraction of acre seized, and a homestead cannot be located on land held in indivision.

28 A. p. 783, 608, 356—26 A. 156.

2. The mortgages securing the claim of the seizing creditor, affected the land seized prior to the passage of the act of the Legislature, known as the homestead act, and—in such a case—the land may be sold to satisfy the mortgage.

20th A. p. 244.

It matters not, as concerns James L. Cole and his wife, that defendants have not introduced the evidence of the tacit or legal mortgage bearing in favor of Ernestine Cropper on the plantation seized. It is sufficient—as to them—that, in the judgment rendered contradictorily with them, more than ten years ago, that mortgage is expressly recognized, as having taken effect on said plantation since the 18th of August 1855—nor does it make any difference that the whole of the property, instead of Cole's interest therein has been seized by the sheriff. His co-proprietor alone might, perhaps, complain of that alleged irregularity.

We do not consider that a single valid defence has been opposed by plaintiffs to the execution of the judgment transferred to Thomas La Chambre and Co. and—by their injunction—they and the surety on their bond, have incurred an amount of damages equal at least to that of their bond.

It is, therefore, ordered, adjudged and decreed that—in so far as it dissolves the injunction and rejects the demand of plaintiffs, the judgment of the Lower Court is affirmed: and—amending the same,

It is further ordered, adjudged and decreed that Thomas La Chambre & Co. do have judgment against and recover, as damages, from plaintiffs—the said Henriette Lauve and James L. Cole, and Arthur Shiff, their security on the injunction bond, jointly and severally, the sum of three hundred dollars.

It is lastly ordered, adjudged and decreed that the costs of this appeal be paid by plaintiffs.

Rehearing refused.

No. 7232.

JOHN L. STERRY VS. THE BOARD OF LIQUIDATION.

Bonds of the State issued in strict conformity to law, and for a valid consideration, and not shown to have constituted a part of the free-school fund, are entitled, under the funding act of 1874, to be exchanged for the consolidated bonds of the State.

A PPEAL from the Third District Court, parish of Orleans. *Monroe, J.*

Hornor & Benedict for plaintiff and appellee.

J. C. Egan, Assistant Attorney General, for the State, intervenor and appellant.

The opinion of the court was delivered by

MANNING, C. J. The plaintiff is the holder of six bonds of the State for one thousand dollars each, issued to the New Orleans, Jackson, and Great Northern Railroad, with coupons payable semi-annually for thirty dollars each, on and after May 1, 1874. He applied to the Board of Liquidation to have them funded under the Act of 1874 (Sess. Acts, p. 39), and the amendatory act of the following year (Sess. Acts 1875, p. 110).

The answer of the Board is a general denial. The State intervenes in behalf of the Free School Fund and claims the bonds as the property of that fund, of which she is the trustee, averring that they lost their negotiability when that fund became the owner thereof, and were no longer alienable. The Secretary of State and Treasurer, as custodians of the school fund join in the intervention.

The act of Congress of 1843, authorizing the sale of the lands theretofore reserved and appropriated for the use of schools, and the investment of the money arising from such sale in a productive fund; and the several acts of our legislature, passed for the purpose of carrying into effect the intention of Congress, have been recited at length in the State *ex rel. Durant v. the Board of Liquidation*. 29 Annual, 77.

The constitution of 1852 declared that the proceeds of the sales of these lands shall be held by the State as a loan, and shall be a perpetual fund on which the State shall pay an annual interest, which interest shall be applied to the support of public schools, and such appropriation shall remain inviolable. art. 137. The constitution of 1868 contains the same provision. art. 139. In 1872 the legislature undertook to abolish the free school fund—the same fund that had been created by Congress and the General Assembly of this State—and required the Auditor of Public Accounts and the Treasurer to advertise and sell the bonds belonging to this fund; and further enacted that all moneys, bonds, and other assets belonging to it should be transferred to another fund,

Sterry vs. the Board of Liquidation.

created and to be known as the fund for the redemption of the floating debt of the State. Sess. Acts 1872, p. 134.

We held in Durant's case that the legislature had not authority to divest the free school fund from the purposes to which it had been directed to be sacredly applied. But there is no proof in this record that the bonds of the plaintiff ever belonged to that fund. The report of the State Treasurer, and the advertisement of sale of bonds, and the report of that sale, mention a large number of bonds that were then disposed of, and among them many belonging to the free school fund, but there is nothing to shew that these bonds were among them. There is nothing in the evidence that identifies these bonds with those sold under the act of 1872.

There is no dispute that the bonds of the plaintiff were issued in strict conformity to law—and not in violation of either the National or State constitutions—and for a valid consideration, and therefore they have the three qualities required by the Funding Act, and are entitled to be converted into State consols. But as the intervenors have not furnished any proof that they constituted a part of the Free School Fund, their intervention was properly dismissed.

The judgment of the lower court is affirmed.

No. 7304.

THE STATE EX REL. T. FONTELIEU ET AL. VS. THE JUDGE OF THE SIXTEENTH DISTRICT.

A suspensive appeal will not lie from an order of the District Court of the State transferring a suit from another District Court of the State.

APPPLICATION for a mandamus.

Breaux, Fenner & Hall, and Edward Simon for relator.

Robert Perry and Frank D. Chretien for respondent.

The opinion of the court was delivered by

MANNING, C. J. A rule was taken before the judge of the Sixteenth Judicial District upon the relators to shew cause why a suit pending in the third District should not be transferred to the first named court. The relators excepted that the proceedings have been discontinued by the district attorney of the third District, and then answered. The judgment overruled the "motions, exceptions, and defences" filed by the district attorney, and the rule was made absolute. A suspensive appeal was prayed, which being refused, the relators have applied for a mandamus, and we have now to determine whether the provisional writ shall be made peremptory.

State ex rel. Fontelieu et al. vs. Judge of Sixteenth District.

There is a manifest reason why an appeal should lie from an order transferring a cause from a State court to a U. S. court, that does not hold good when the transfer is from one State court to another. In the former case, the State courts lose the jurisdiction entirely, and if an appeal were not permitted, there would be no opportunity to ascertain or test the legality of the order. But in the latter case, the appeal is eventually to this tribunal, and the order of removal comes up with the final judgment, and is subject to our review. The injury is therefore not irreparable.

In *Todd vs. Andrews*, 3 Mart. N. S. 25, the appeal was from an order transferring a cause to a neighbouring district in consequence of the recusation of the judge, and the court say that the transfer was not such irreparable injury as warranted an appeal, and announce the rule to be, that wherever a party can be relieved on a final judgment, the grievance is not such as requires the aid of this court at an earlier period. And this ruling was followed in *Powell v. Keller*, 1 Annual, 25, and *Pool v. Moorhouse*, 13 Annual, 300. On the other hand, and for the reason that the injury would be irreparable, an appeal would lie if the right of transfer had been denied. *Jarreau v. Choppin*, 6 La. 130.

The peremptory mandamus is refused at the costs of the relators.

No. 4594.

WIDOW DE ST. ROMES VS. WIDOW F. BLANC ET AL.

The final decree of this court recognizing a mortgage which had been fraudulently canceled will not prevent the mortgage from perempting as to third persons, if it has not been re-inscribed within ten years after its record.

A PPEAL from the Fourth District Court, parish of Orleans. *Collens, J.*

L. E. Simonds for plaintiff and appellant.

A. J. Villere for intervenors and appellees.

The opinion of the court was delivered by

DEBLANC, J. On March 2d, 1855, Pierre Devergès mortgaged to Mrs. de St. Romes, certain property, including twelve lots of ground, to secure a note of \$12,988,95c, of even date with the mortgage, and payable one year after its date to plaintiff's order. The mortgage then granted was only recorded, but never re-inscribed.

On the 8th of July 1857, by means of a false certificate, Devergès—the maker of said note—procured the cancellation of the mortgage

given by him to Mrs. de St. Romes, on the 2d of March 1855, and, in September 1857—sold to P. E. Wiltz the twelve lots ground which he had previously hypothecated to secure the payment of his note to plaintiff.

In January 1860, P. E. Wiltz sold to Henry Wiltz the lots he had purchased from Devergès. In 1861, Henry Wiltz sold said lots to Robert Wynn timer, who—in December of that year—resold the same to P. E. Wiltz. The latter, as a part of the consideration of said re-sale, assumed the payment of two notes of each \$1375, given by Robert Wynn timer to Henry Wiltz, his vendor, and which represented two of the instalments of the price of said lots.

Morel and Isnard became the owners of the two notes herein before mentioned, in 1861, before their maturity and *before the institution of plaintiff's* suit to have her cancelled mortgage recognized and enforced. That mortgage was finally recognized by a decree of the Supreme Court of the State, rendered on the 11th of May, 1868.

The mortgage granted on the 2d of March 1855, was recorded on the 3d day of said month, and that inscription preserved its rank for ten years from the date on which it was recorded, and that was until the 3d of March 1865. Up to that date, its rank neither was nor could have been affected or changed by the fraudulent cancellation—but, from that date—did it preserve its rank, though not re-inscribed, for the reason, as contended by plaintiff's counsel, that her rights now rest on the decree of the 11th of May 1868, and not on the inscription, and that the litigation which produced that decree was—as to all interested parties—a standing and sufficient notice of the existence and rank of her mortgage?

This case was—in 1871—remanded from this court for a new trial and to ascertain whether—as alleged by plaintiff—the title of intervenors to the note which they hold, has been acquired after the institution of her suit to have her cancelled mortgage recognized and enforced.

That allegation was, not only not sustained, but absolutely contradicted on the new trial.

Plaintiff's mortgage—as already said—was recorded on the 3d of March 1855, and its cancellation fraudulently procured on the 8th of July 1857. It does not appear that she ever made an attempt to obtain a re-inscription which the Recorder might not have refused or could have been compelled to make; and her suit to foreclose the same was filed on the 30th of March 1863, four years, eight months and twenty-two days after the fraudulent cancellation, two years after Isnard had acquired the note upon which he sues, and more than eighteen months after the transfer of the note which passed into Morel's possession. It is clear—then—that plaintiff's mortgage has perempted. C. C. (3333)

3369—2 A. 100, 520, 768, 799—4 A. 396—5 A. 632, 321—7 A. 344—9 A. 193—
11 A. 390—12 A. 216—13 A. 571—13 L. R. 245—14 L. R. 103—6 R. R.
166, 419, 522—21 A. 229—22 A. 402.

It is, therefore, ordered, adjudged and decreed that the judgment of the lower court is affirmed with costs.

No. 6979.

IN THE MATTER OF THE MINOR, VICTORIA FORTIER.

Whenever an emergency arises which requires immediate action to protect the interests of a minor, it is the right and duty of the probate court to appoint a tutor *ad hoc* to act for the minor, until a tutor can be appointed.

An under tutor has no power to represent the minor in a rule taken by a third person to erase the general legal mortgage of the minor on certain property of the tutor, in a case where there is no opposition of interest between the minor and the tutor. A judgment to erase, in such a rule, is an absolute nullity.

A PPEAL from the Second District Court, parish of Orleans. *Tissot, J.*

T. A. Bartlette for the minor, appellant.

Anatole Briengue for appellee.

The opinion of the court was delivered by

MARR, J. The father and tutor of the minor, Victoria Fortier, on the advice of a family meeting, obtained an order of the Second District Court for the sale of certain real property belonging to her.

It does not appear for what price the property was sold; nor is there any direct proof in the transcript that the sale was actually made. The order of sale was granted on the 15th May, 1872.

In January, 1878, Hoffman, styling himself agent for Adam Paul, filed a motion in the Second District Court, reciting that Paul was the purchaser of the property, at the public sale made on the eighth July, 1872, pursuant to the order of the court; and that, in order to clear up the title, it was "strictly necessary" that the general mortgage resulting from the inscription of the certificate of the Clerk of the Second District Court, in July, 1869, that E. C. Fortier had been appointed tutor of the minor, Victoria Fortier, should be canceled and erased.

On this motion a rule was granted, requiring Joseph Holz, under tutor of the minor, Victoria Fortier, to show cause, instantan, why the mortgage should not be canceled and erased. Holz was present; and he, in open court, submitted the rule, and it was made absolute at once.

Some two weeks after this judgment was signed, an attorney, in behalf of the minor, moved the court to appoint a tutor *ad hoc* for her, stating that her father and tutor had departed this life, without saying

when: that she was without a tutor: and that her interests required some one to act presently in her behalf. The court immediately appointed a tutor *ad hoc*; and, on the same day, this appeal was taken by the minor and the tutor *ad hoc* from the judgment ordering the mortgage to be canceled and erased.

At first we had some doubt as to the validity of this appointment; but our conclusion is, that, under the general supervisory power which the probate court has over the interests and affairs of minors, when an emergency arises which requires immediate action for the protection of the rights of the minor, the judge not only has the authority, but it is his duty, to appoint a special tutor *ad hoc* to represent and act for the minor until a tutor can be appointed in the manner prescribed by law.

We are at a loss to imagine what interest or business Adam Paul had to demand the cancellation of this mortgage, nearly six years after his alleged purchase of the property. The property belonged to the minor, and not to her father; and, of course, no mortgage could ever have attached to it, in her favor, for his acts as her tutor.

The judgment is a nullity on the face of the proceedings. It is a serious matter to cancel and erase the tutor's mortgage. It is the only security which the law requires of the father for his gestion as tutor; and it is intended to secure the rights of the minor as fixed and established by the final account and settlement of the tutorship. It does not seem that any proof was offered: there was no trial of the rule to show cause; and it is certain no cause is shown, in the recitals of the motion, for this cancellation. If the minor's property was actually sold, the tutor was the only person who could have received the price; and his liability to her must be and remain secured by the general mortgage on all his real property.

The tutor did not ask to have this general mortgage canceled; nor was he in any way made a party to the rule. If he had sought to have it canceled he would have been required to furnish special and satisfactory security. The father, tutor of his child, is interested in seeing that the rights of the child are secured as the law prescribes. There was, therefore, no opposition of interest between the tutor and the minor; and this is the only contingency which authorizes the under tutor to represent and act for the minor. R. C. C., art. 275.

The law makes it the duty of the under tutor to see that the evidence of the legal mortgage in favor of the minor is preserved; and his failure to do his duty, in this respect, would subject him to pecuniary responsibility for any damages that might thereby result to the minor. R. C. C., art. 278. Certainly the law never intended to give the under tutor power or authority to consent to the destroying of the evidence of

the mortgage by the canceling and erasing of the inscription by which it is preserved.

If the father, tutor of the minor, was living at the time this rule was taken, he was the only person who could have represented her in that proceeding: if he was dead, it was the business of Holz, the under tutor, to have informed the court of that fact at once, and to have provoked the appointment of a tutor. In neither event was Holz capable of standing in judgment for the purposes of this rule.

The judgment appealed from is therefore annulled, avoided, and reversed: and it is now ordered, adjudged, and decreed that the rule on which the said judgment was rendered be dismissed; and that Adam Paul pay all the costs in the district court and of this appeal.

No. 7142.

M. N. AND W. B. WISDOM VS. E. T. PARKER, DATIVE EX. E. T. PARKER, EX., VS. M. N. AND W. B. WISDOM. WISDOM, M. S. AND W. B., VS. H. S. BUCKNER. H. S. BUCKNER VS. WISDOM, M. N. AND W. B., CONSOLIDATED.

A widow, who by a series of acts extending through years has tacitly accepted the community, can not afterward renounce it.

The probate court before which a succession has been opened, and is being administered, has jurisdiction, at the instance of a mortgage creditor of the succession, to order the sale of the mortgaged property, and the sale of such property, under an order of seizure and sale issued by the probate court, is not a nullity. The order must stand as a binding decree of court until reversed by an action of nullity, or on appeal.

Innocent third persons who purchase property at a public sale held under the decree of a court of competent jurisdiction, can not be affected by any irregularities in the decree subsequently ascertained.

A suit for the enforcement of a mortgage debt is not a real action.

APPEAL from the Fourth District Court, parish of Orleans. *Houston, J.*

Thos. J. Semmes for M. N. and W. B. Wisdom, appellees.

J. Ad. Rozier, Kelly & Lazarus, and Jno. A. Campbell for H. S. Buckner, appellant.

The opinion of the court was delivered by

SPENCER, J. John M. Wisdom was a member of the firm of Hewitt, Norton & Co., of New Orleans. He died in 1857, leaving a widow in community, and two minor children, M. N. and W. B. Wisdom. His interest in that firm was liquidated at \$125,000, and in payment thereof James Hewitt, of the firm, executed two promissory notes to the order of and endorsed by Hewitt, Norton & Co., for \$62,500 each,

Wisdom vs. Buckner.

payable one in five, and one in ten years, with eight per cent interest, payable semi-annually.

To secure the payment of these notes, said Hewitt executed a special mortgage on his Crescent Plantation, in Ascension parish, in favor of Mrs. Wisdom, widow in community and natural tutrix, and in favor of any other holder of said notes.

These notes represented community property, and were delivered to Mrs. Wisdom, who was owner of one half interest therein, and usufructuary of the other half.

The first of them was paid to her in Europe, in 1864, during her widowhood. In 1866, while still in Europe, she contracted a second marriage with M. O. H. Norton, without having previously convened a family meeting to retain her in her tutorship.

On returning to this State, in 1868, (Feb.) she filed a petition in the Second District Court of New Orleans, in which she alleged that she was the holder and owner of the second above described note, that the maker, James Hewitt, was dead, and his succession under administration in that court by Mrs. Hewitt, executrix. She prayed for and obtained executory process to sell the mortgaged property. The writ was issued, the property sold in March, 1868, to one Bell, for \$23,500 cash, and the proceeds, less costs, paid by the sheriff to the Widow Wisdom, then Mrs. Norton, plaintiff in said proceeding.

In Feb., 1869, Mrs. Wisdom presented a petition to the Second District Court, representing that she had contracted a second marriage as above stated in Europe, where she could not conveniently procure the consent of a family meeting to retain the tutorship of her minor children. She prayed the convocation of the meeting, and that she be retained and confirmed as natural tutrix, etc. The meeting so advised. The court homologated its proceedings, and decreed that she be "retained, maintained, and confirmed as natural tutrix" of the minors. She did not renew her oath or give bond under this decree.

In March, 1869, she in her own right as widow in community with her first husband, and as natural tutrix, brought suit against Hewitt's estate in the Second District Court, to determine the extent of lands previously sold, and for judgment against said estate for the balance due on the \$62,500 note, after crediting the \$23,500, proceeds of said sale.

There was judgment in her favor as prayed for, on July 1, 1870.

In 1871, Bell executed a mortgage on the Crescent place, and H. S. Buckner, in 1873, as holder of the notes, foreclosed and bought the property.

In March, 1875, Wm. B. Wisdom, the younger son, was emancipated, and the mother, Mrs. Wisdom, made a formal renunciation of the community between her and her said deceased husband.

After these proceedings, the two sons, now *sui juris*, took a rule in Second District Court, on E. T. Parker (who had been appointed dative executor of James Hewitt's estate) to compel him to sell the Crescent plantation to pay said note of \$62,500, of which they claimed to be the owners. The court dismissed this rule. Thereupon they applied to the Fourth District Court of New Orleans for an order of seizure and sale of said place, to pay said note. This proceeding was enjoined by Parker, executor, and H. S. Buckner intervened. The Wisdoms then took an order of seizure and sale against Buckner, as a third possessor. Buckner enjoined, and Parker, executor, intervened. These executory proceedings and injunctions were all consolidated and tried together. There was judgment maintaining the process and disallowing the injunctions. Buckner and Parker appeal.

As a preliminary to the discussion of the questions involved in this litigation, and in order to disembarass the case as much as possible, we will here state that we shall treat the Widow Wisdom as a partner in community with her deceased husband, as owner in her own right at his death of one half of the property, and as usufructuary of the other half. It would be a useless consumption of the time of this court to enter upon an argument to show the nullity of her pretended renunciation. The bare statement of the facts makes it palpable.

The pretensions of M. N. and W. B. Wisdom must fail, unless it be held that the decree of the Second District Court, ordering the seizure and sale of the mortgaged property, was an absolute nullity, for want of jurisdiction.

The eighth section of the act of March 29, 1865, relative to district courts for the parish of Orleans, and under which that court was organized, enacted "that the Second District Court shall be strictly a probate court, and shall have exclusive jurisdiction of all *succession* and probate *causes*, and all appointments that may be necessary in the administration of estates, all matters relative to minors, to persons interdicted, and to absentees, shall be made and carried on in said Court."

When we turn to the Code of Practice to ascertain in what "probate jurisdiction" consisted, we find that by Art. 924 probate courts have *exclusive* power,

5. "To grant orders to make inventories and sales of the property of successions which are administered by curators, executors, etc."

13. "To decide on all claims for money which are brought against successions administered by curators, executors, etc., and to establish the order of privilege and mode of payment."

Art. 983. "All debts in money which are due from successions administered by curators, executors, etc., *shall be liquidated, and their payment enforced* by the court of probate of the place where the succession was opened."

Art. 990 makes it "the duty of the several judges of probate, on the application of the creditors, or any creditor," to order the sale of "so much of the property of the said estate as is necessary to pay the debts, etc."

Art. 991 makes it their duty "on the application of the creditors, or any creditor thereof, whose debt shall not then be due, to sell so much of the estate as will be sufficient to pay the claim or claims of the creditors who shall make the application," on terms of credit corresponding to the maturity of the claims.

Art. 992 declares these provisions applicable to all successions accepted with benefit of inventory, and to all successions administered by administrators, etc.

It is conceded that the succession of Hewitt was opened in the parish of Orleans, and was being there administered in the probate court thereof, to wit: the Second District Court.

Under the statute of 1865, and the articles of the Code of Practice above quoted, it is therefore undeniable that the Second District Court was the tribunal before which the law had directed "all debts in money of the succession of Hewitt to be liquidated," that it was the tribunal "to decide on all claims for money brought against said succession," that it was the tribunal to "enforce their payment," and to order "the sales of the property" thereof to pay its debts, that this order of sale could be granted on the application of any creditor, in order to have property sold to pay his debt.

Union Bank vs. McDonogh, 7 A. 232.

Art. 87, C. P., provides that "in order to ascertain whether a judge be competent or not, three points must be taken into consideration:

1. The object or amount in dispute.
2. The person of the defendant.
3. The place where the action is to be brought.

Art. 88, "To determine on the competency of a judge as relates to the object, or amount in dispute before him, it is necessary to examine what are his powers, what is the nature of the cause, and what is the amount of the same."

Let us test the jurisdiction, the competency of the Second District Court, by these rules.

There is no dispute as to its jurisdiction of "the person" of the defendant, i. e., of the succession of Hewitt, nor is there any controversy as to "the place where the action is to be brought. There remains therefore to consider" the object or the amount in dispute.

We have seen "what are the powers" of the probate courts. It is "to liquidate and enforce the payment" of money debts due by successions—"to decide on all claims for money" brought against them, "to

order the sale of their property" on "the application of the creditors or of any creditor" thereof, and to establish the order of privilege, and the mode of paying. We find, therefore, the most ample power in the Second District Court to direct by its decree the sale of the property of the succession to pay the debts thereof. We find that "the nature of the cause" brought before it was to have "a claim for money," founded on an authentic contract of the deceased, enforced and paid by a sale of his property, and that its "amount" was within the cognizance of the court.

The substance, the gist, of the plaintiff's demand, the result sought, was the enforcement of a money demand against a succession, by a sale of property specially mortgaged and pledged to secure it. The court had the power, the jurisdiction, to accomplish and decree that result, that end.

The essence of the decree rendered was that the Crescent plantation, the property of the succession, should be sold by the sheriff to pay the special mortgage debt held by plaintiff. This much the court clearly had the power to do. If the procedure, the pleadings and methods pursued to obtain this decree were irregular, or illegal, the decree itself was not thereby rendered void. It might so vitiate the decree as to render it voidable by appeal or action of nullity, but until so set aside it must have effect. Nor can we see that the fact that the plaintiff may have demanded, and obtained incidentally, things to be done which she had no right to have done, can destroy the effects of the decree, as to those matters properly embraced within it. Thus if it be conceded that the court had the power to order the sheriff to sell the property which was in its own custody, but had no right to order him to *seize* it, we are at a loss to see why the sale should be rendered null and void by this improper but harmless procedure, *utile per inutile non vitiatur*. If a court decree more to be done than it had a right to decree, it does not necessarily follow that its decree is void as to the things which it properly and lawfully ordered.

The case of "Bigelow vs. Forrest," 9 Wallace 339, cited and relied upon by counsel, is, we think, strongly illustrative of this point. In that case the inferior court under the confiscation acts had condemned and sold the *fee simple* of certain lands of Commodore Forrest. After his death his heir brought suit against the purchaser, who defended on the ground that the decree ordered *all the estate* of Forrest to be sold, and that although the decree might be erroneous it was not void. Held that the decree transcended the jurisdiction of the court, and was void, so far as it exceeded the authority given by the confiscation acts. But the decree was valid so far as it ordered the sale of the life interest. So we say, admitting for argument sake that the judge illegally directed the

seizure of the property, that could not strike with nullity the sale which he properly ordered.

To the extent that the decree exceeds the jurisdiction, it is without effect. If after eliminating from the decree its illegalities there remains the recognition and the order for the enforcement of a substantial legal right, why should it be null and void as relates to that right? In the case before us why should an order to sell succession property to pay succession debts be stricken with nullity simply because the court directed its executive officer to take the real estate to be sold into his nominal custody? More especially when the property thus directed to be taken by the court was already in its own custody as a court of probate?

It can not be that our estates depend upon such slender threads as these.

It is manifest that the Second District Court had jurisdiction of the parties, and of the *subject matter of the suit*. Says the Supreme Court of the United States in *Thompson vs. Toulme*, 2 Pet. 166: "The general and well-settled rule of law in such cases is, that when proceedings are collaterally drawn into question, and it appears upon the face of them that the *subject matter* was within the jurisdiction of the court, they are *voidable only*: the errors and irregularities, if any exist, are to be corrected by some direct proceeding, either before the same court to set them aside, or in an appellate court."

But it is said that the executory proceeding taken in the Second District Court was a real action, and that by the express terms of the second clause of Art. 983, C. P., "Actions of revendication and other real actions" shall be instituted in the courts of "ordinary jurisdiction."

A claim for money secured by mortgage is not a *real* right, a *jus in re*. It is a *jus ad rem*, giving an action *in rem*. The action is *in rem*, against the thing; but so are all proceedings in probate courts for the sale of real estate. Such proceedings are against the property, not the person or heirs of the debtor. "In decreeing the sale of real estate of a deceased person, the court acts *in rem*." Freeman on Judgments, sec. 608. See, also, *Wyman vs. Campbell*, *Lee vs. Campbell*, *Couch vs. Campbell*, 6 Post, (Ala.) 219, 249, 262, where it is said "the proceedings of the Orphans' Court are *in rem* against the estate of the intestate, and not *in personam*."

And this is equally true of the probate courts in this State. The proceeding is against the property, not the person of the debtor, the property being in the custody of the court through its officers. To say, therefore, that Art. 983 forbids actions *in rem* to be brought in probate courts, would be to strip them of nearly the last vestige of their jurisdiction in succession matters.

We hold, therefore, that the decree of the Second District Court directing the seizure and sale of the Crescent plantation, at the suit of Mrs. Norton, in 1868, was not a nullity. That it was the decree of a court having jurisdiction of the subject matter, and of the parties; and that any irregularities or illegalities in the mode of obtaining that decree could only be corrected by appeal, injunction, or action of nullity.

It is elementary now, that innocent third persons purchasing property under such a decree are protected, and can not be affected by its subsequently ascertained irregularities. *Thompson vs. Toulme*, 2 Pet. 166; *Lalanne vs. Moreau*, 13 A. 437; 10 Peters 449; 18 How. 497; 7 R. 66; 2 A. 468; 14 A. 154; 18 A. 485.

Mrs. Norton had possession of the note, was the owner of one half of it, and had been usufructuary of the other. It was endorsed *in blank* and secured by mortgage *in favor of any holder*. She alleged her ownership, and the decree recognized it. The note being payable to bearer, a payment to her, made *bona fide*, would have discharged the debt. R. C. C. 2145, No. 1. If her children have any rights, it is against her, for misappropriation of their funds. They have made no effort to obtain their dues from her; have not called her to account as their tutrix. Who knows but that on a settlement she would owe them nothing, or, at least, much less than they are claiming here? There is little equity in their demands; it is even questionable whether she was not absolute owner of the note. She certainly owned one half of it, and it might be argued very plausibly that under Act. 549, R. C. C., her usufructuary right carried with it the ownership, as the thing subject to the usufruct was of a nature not to be used without being converted into money or consumed. See *Marcadé*, vol. 2, p. 461-2. *Demolombe*, *Verbo Usufruct*; p. 235, sec. 287.

Under the view we have taken, it is perhaps necessary to decide whether the Second District Court under the act of 1865 could legally and technically order the *seizure* and sale of mortgaged property in its custody. Certain it is, there is no law, no statute to the contrary.

We have examined all the cases cited, for and against the proposition. In *Lowry vs. Erwin*, 6 R. 207, the court says that courts of ordinary jurisdiction are without authority, and intimates that courts of probate are equally so.

In *Collier vs. Stansborough*, 6 R. 234, it is held that courts of ordinary jurisdiction can not issue the writ against successions, and intimates that the probate courts alone have the power.

In *Citizens' Bank vs. Buisson*, 7 Rob. 507, the court, founding itself on the charter of the bank, recognizes the right of courts of ordinary jurisdiction to issue it.

In *Union Bank vs. Marigny*, 11 R. 211, on the strength of the bank's

charter, the same conclusion is reached, the court saying that probate courts had not the power. But this was *obiter*.

In *Boguille vs. Faille*, 1 A. 205, it was finally decided and has ever since been agreed to, that courts of ordinary jurisdiction have the power, but it is not denied to probate courts.

In *Mason's Ex. vs. Fuller*, 12 A. 68, it is said that the creditor can apply to the probate court for an order of seizure and sale. In *Williams vs. Hunter*, 13 A. 477, a similar doctrine is announced. In *Vincent vs. D'Aubigne*, 19 A. 528, which was an action to annul a sale made under executory process from Second District Court (probate), the question was not raised or decided.

In *State vs. Judge Third District Court*, 20 A. 311, the court decided that under the charter of the Bank of Louisiana courts of ordinary jurisdiction could issue the writ, and it is intimated that probate courts can not, but this last was *obiter*.

In *Graham vs. Markey*, 22 A. 267, the court perpetuated an injunction against an order of seizure and sale, issued by the Second District Court against succession property, citing as authority *Bank vs. Marigny*, 11 R. 211, and *State vs. Judge Third District Court*, 20 A. 311.

We thus see, that while it is now settled that courts of ordinary jurisdiction have the power to issue writs of seizure and sale against succession property, there is but one solitary case, that of "*Graham vs. Markey*," 22 A. 267, where the court has directly decided that courts of probate have not the power.

The decision in that case is very brief, and not satisfactory. The weight of authority and of reason seems to be against its correctness. Why should not that power exist in courts created for and specially charged with the settlement of successions; with the ascertainment, liquidation, and enforcement of money demands against them; with the classification and ranking of such debts, and into whose custody the law places the property of estates? True, the law does not expressly grant the power, nor does it any where forbid it to them. No more does it expressly grant it to courts of ordinary jurisdiction in matters of succession. Philosophically, it would be more rational to vest such power in the probate courts, which are alone charged with the settlement of successions, thereby avoiding the confusion which inevitably results from the intervention of the ordinary courts, which have no power to rank and classify the debts of successions. 11 R. 77.

The judgment below is erroneous. It is therefore ordered, adjudged, and decreed that the judgment appealed from be avoided and reversed; and it is now ordered and decreed that the executory proceedings sent out by M. N. and W. B. Wisdom herein are set aside, and the injunctions taken against said proceedings by H. S. Buckner and E. T. Parker,

executor, are hereby maintained and made perpetual, and that M. N. and W. B. Wisdom pay the costs of both courts.

ON APPLICATION FOR REHEARING.

We have been urged to reconsider the grounds of our former opinion in this case.

In that opinion we announced the doctrine that a mortgage did not create a *jus in re*, but only a *jus ad rem*, giving an action *in rem*. We did not then state the grounds or authority for that enunciation. Its correctness is strongly assailed by the plaintiff's counsel, and we shall therefore proceed to state more in detail our views. The point is one of some moment in this controversy; for under Art. 983 of the Code of Practice, "actions of revendication and other real actions which shall be instituted against estates, may be brought before ordinary tribunals," but "all debts for money * * shall be liquidated and their payment enforced by the courts of probate, etc." It should be noted that this article does not say that "real actions" must or shall be brought before the ordinary tribunals, but may be so brought. So that its language does not exclude the idea that a real action, having for its object the enforcement of "a debt for money" (if such an action can be real), can lawfully be brought against successions in the probate courts. Indeed, our decision in this case was, that an action to enforce a mortgage against a succession (and plaintiff's counsel insists that it is a real action) may be brought either in the probate courts or in the ordinary courts. So that even if such action be real, our decision is not in conflict with that article.

But is an action to enforce a debt secured by mortgage a real action? Article 12 of the Code of Practice decisively answers this question. It says, "actions for the recovery of a movable, or of a sum of money, though accompanied with a mortgage, are not real actions."

In the face of this provision, it would be useless for us to discuss the conflicting views of the French jurists upon the question of whether a mortgage creates a *jus in re* or *jus ad rem immobileur*. We will state, however, that to our minds the argument of Marcadé in favor of the latter proposition and against the former is quite conclusive, and we think is in harmony with our Code. See his work, v. 2, p. 349, *et seq.* We understand a *jus in re* to be a right to some of the elements or dismemberments of property in a thing. Now the Civil Code in treating of this right of property in things, divides it into three elements, the use, the enjoyment, and the disposal: *usus, fructus, and abusus*. Under the first and second it classes use and habitation, usufruct and real servitudes, and under the third naked ownership. This classification exhausts the right of property in things, and, we think, includes all the

jura in re. No amount of ingenuity can bring the rights of a mortgagee under either head of this classification.

We are referred to Art. 3282 of the Revised Civil Code, as containing the declaration that a "mortgage is a *real right on the property* bound for discharge of the obligation."

That article is the reproduction of Art. 3249 of the Code of 1825, which was in force when this controversy originated. Art. 3249 says, "The mortgage is a *legal right on the property*," etc. The word "*real*" seems to have been a misprint for "*legal*." But even Art. 3282 R. C. C. does not say that a right of mortgage is a *right in the property*, but a *right on it*, that it is *ad rem*, not *in re*. However this may be, the Code of Practice is positive that *an action to enforce a mortgage debt is not a real action* and therefore, even if Art. 983 C. P. were prohibitory of bringing *real actions* in probate courts, it would not prevent the enforcement of mortgages in such courts. We understand the Code of Practice in speaking of the "hypothecary action" as "a real action," (Art. 61) to mean that it is an action *against the thing—in rem*, as contradistinguished from actions *against the person—in personam*. In the "hypothecary action" proper, there is no pursuit of the person. The thing mortgaged is the debtor, and the action is directed against it. In this sense, the action is real.

Rehearing refused.

No. 5744.

MAURICE ABRAMS & Co. vs. UNION NATIONAL BANK.

Where a bank certifies as good a check on it to the order of a certain payee, and the check is subsequently altered by the drawer so as to make it payable to bearer, and thus altered is paid by the bank to some unknown party before the original payee is advised of the certification, and before any third person has acquired an interest in the check, the bank can not be held for any loss to others caused by paying the check, because of an agreement between those others and the drawer, to which the bank was not privy.

A PPEAL from the Superior District Court, parish of Orleans. *Hawkins, J.*

Lacey & Butler for plaintiffs and appellants.

Carleton Hunt for defendant and appellee.

The opinion of the court was delivered by

SPENCER, J. Plaintiffs' petition alleges in substance that on the 25th of January, 1875, W. Jasper Blackburn was owner of four State warrants aggregating \$9579 25. That about said date said warrants were robbed or stolen from Blackburn, and shortly after came into possession of

Barnett & Cammack, who placed them in Abrams' hands, as broker, for sale; that Abrams sold them to Moore, Janney & Hyams for \$2514 55; that with the view of guarding against loss or injury from want of proper indorsement of said warrants there was an understanding and agreement with Barnett & Cammack—to whom Abrams paid proceeds of sale, less \$135, by certified check on Mechanics' & Traders' Bank—that said Barnett & Cammack would, in their settlement with the party for whose account they were disposing of said warrants, give their check to the order of C. S. Blackburn, to whom or to whose order as petitioner then believed, said warrants were also payable; that Barnett & Cammack deposited the check received by them from Abrams in the Union National Bank, and upon the strength of said deposit the Bank certified as good their, Barnett & Cammack's, check upon itself for \$2322 43 payable to the order of C. S. Blackburn; that afterward the check of Barnett & Cammack was improperly altered so as to make the same payable to bearer, and that in its altered form the said check was presented, and paid by the Bank, not to C. S. Blackburn, but to some other wholly unauthorized person. It is further alleged that W. Jasper Blackburn, the true owner of said warrants, subsequently recovered them from Moore, Janney & Hyams; that had the Union Bank refused to honor the altered check, as it should have done, then plaintiffs could have saved themselves by reclaiming their check given to Barnett & Cammack, or its amount as represented by the said altered check, etc.

The Bank excepted that plaintiffs' petition did not disclose any legal cause of action. This exception was sustained, and plaintiff appeals.

There is no error in the judgment. There is no pretense of allegation that the Bank knew of, or was privy to the alleged agreement or understanding with Barnett & Cammack, to draw their check to order of C. S. Blackburn. There is no intimation that Blackburn ever knew or assented to the certification of the check in his favor, or ever held it for a moment. See Morse on Banks and Banking, p. 287. On the contrary, the allegation is that Barnett & Cammack, who held the check when certified, themselves altered it before parting with it. What right had the Bank to object to the change, when made by the drawer before any third person had acquired any rights in or under the check? The Bank knew nothing of the "arrangement" between plaintiffs and Barnett & Cammack, and therefore had no right to suppose that the latter were doing a wrong. If I draw my check on the Bank to the order of another, and myself procure its certification, until I part with the check, or, certainly, until the payee has consented to accept the stipulation in his favor, I may withdraw it, and the Bank could not refuse to cancel or redeem the check in my hands. Like any other stipulation *pour autrui*, until accepted it may be revoked.

It was of the essence of plaintiffs' case that they should have alleged that the Bank at least knew of the "arrangement" or "agreement" referred to. Without such allegation there is no legal cause of complaint against the Bank—there was no *fault* on its part which rendered it liable to plaintiffs.

The judgment is affirmed.

No. 5770.

THOMAS W. BOTHICK VS. SOCIETY TEMINE DERECHÉ.

A creditor of a corporation suing to forfeit its charter on the ground of its insolvency must, before he can demand the provisional appointment of a receiver, or judicial sequestrator, under section 688 of the Revised Statutes, prove that the corporation is the special kind of corporation subject to a forced liquidation under that section.

A PPEAL from the Superior District Court, parish of Orleans. *Hawkins, J.*

Hornor & Benedict for plaintiff and appellant.

Braughn, Buck & Dinkelspiel for defendant and appellee.

The opinion of the court was delivered by

MARR, J. Thomas W. Bothick obtained a judgment against the Society Temine Dereché, a corporation established by act under private signature, recorded in the mortgage office twenty-seventh November, 1857, as alleged in the petition. On this judgment execution issued, which was returned by the sheriff "no money or property found," after demand made of defendant and of plaintiff. Thereupon this suit was brought to have the forfeiture of the charter declared; and to have the affairs of the corporation liquidated, as provided by section 688 of the Revised Statutes, which is but the re-enactment of section six of act No. 131 of 1855, p. 184.

Plaintiff also prayed for and obtained a rule *nisi*, on affidavit, to show cause why the assets, rights, credits, claims, etc., belonging to the society, of whatsoever nature, should not be judicially sequestered during the pendency of this suit, and why a receiver or judicial sequestrator should not be appointed to take charge of the same.

There was no answer or other pleading on the part of defendant. The rule was tried, however; and the result was a judgment discharging it, and dismissing the suit, for reasons orally assigned. Plaintiff appealed from this judgment; and he has filed a brief. Defendant has filed no brief; and the case was submitted without oral argument.

The Legislature of 1855 passed several acts relative to corporations,

which were re-enacted in the Revised Statutes. Act No. 131 is entitled "An act for the organization of corporations for works of public improvement and utility;" and section six of this act, which is section 688 of the Revised Statutes, provides "that they," that is, corporations organized under this act, "shall forfeit their charter for insolvency, evidenced by a return of no property found on execution; and in such case it shall be the duty of the district court, at the instance of any creditor, to decree such forfeiture and to appoint a commissioner for effecting the liquidation, whose duty it shall be to convert all the assets of the company, including any unpaid balances due by stockholders on their shares, into cash, and to distribute the same under the direction of the court among the parties entitled thereto, in the same manner, as near as may be, as is done in cases of insolvency of individuals." This is the law under which plaintiff proceeded.

The succeeding act, No. 132, is entitled "An act for the organization of corporations for literary, scientific, religious, and charitable purposes." This act contains no provision for the forced liquidation of corporations organized under it. The title of act No. 132 is the heading of the first division of the title "Corporations," in the Revised Statutes; and the heading of the second division is, "Organization of Corporations for Works of Public Improvement, and for other purposes." It is in this division, under this heading, that section 688 is found.

The Legislature of 1855 passed another act, No. 341, p. 485, entitled "An act to regulate corporations generally." This act is re-enacted in the Revised Statutes; and it is found under the division of the title "Corporations" the heading of which is "Corporations generally." Section seven of the act is section 731 of the Revised Statutes; and it is as follows:

"Whenever the charter of any corporation in this State shall be decreed forfeited by any competent court, the district attorney of the district shall forthwith inform the Governor of the fact, who shall thereupon appoint a liquidator to take charge of and liquidate the affairs of the corporation, as in case of insolvencies of individuals. In case of death * * * the Governor shall fill the vacancy * * * This section shall not apply to banking or other corporations whose liquidation is otherwise provided for by law."

The charter of this company was not offered in evidence; nor is there any thing in the pleading which indicates the purposes for which the corporation was organized. It may have been for some literary, or scientific, or religious, or charitable purpose, and in that event it would not be subject to the provisions of section six of act 131, of 1855, section 688 of the Revised Statutes, because that law relates to corporations for works of public improvement and utility, not to corporations organ-

Bothick vs. Society Temine Dereche.

ized for literary, scientific, religious, and charitable purposes, as authorized by act No. 132 of 1855.

If the purposes of this corporation were such that it is not subject to section 688 of the Revised Statutes, and the law has not otherwise provided for its liquidation, it may be subject to section seven of the act No. 341 of 1855, section 731 of the Revised Statutes.

Nothing was before the court except the question raised by the rule *nisi*, taken on the corporation, to show cause why its assets should not be judicially sequestrated, and why a receiver should not be appointed.

We do not think the allegations in the petition authorized the court either to order the judicial sequestration, or to appoint a receiver; but we think the plaintiff had the right to have the petition put at issue, and to bring his case within the law under which he proceeded, by proof, if he could do so. If the corporation should be proven to be such as is subject to the forced liquidation provided for in section 688, Revised Statutes, it would be the duty of the court to appoint a commissioner to effect the liquidation; and this commissioner would, necessarily, have the custody of the property and effects of the corporation.

The judgment appealed from was correct in discharging the rule, because there was nothing before the court to authorize the sequestration or the appointment of a receiver. It was erroneous in dismissing plaintiff's suit.

It is therefore ordered, adjudged, and decreed that the judgment of the district court in so far as it discharged the rule; be affirmed that in all other respects it be annulled, avoided, and reversed; and that the cause be remanded for further proceedings according to law, the appellee paying the costs of the appeal; the costs in the district court to abide the final result.

No. 5783.

CITY OF NEW ORLEANS VS. WILMOT, AGENT.

The city of New Orleans has no authority to impose wharfage and levee dues on vessels moored at a point within her corporate limits, at which she has constructed no work and expended no money for the use or convenience of vessels.

A PPEAL from the Second Justice of the Peace, parish of Orleans.
Holmes, J.

Sam. P. Blanc, Assistant City Attorney, for plaintiff and appellant.

J. Q. A. Fellows and Bayne & Renshaw for defendant and appellee.

The opinion of the court was delivered by

MARR, J. This a suit for the tax, under an ordinance of the city of New Orleans, on coal boats, for wharfage and levee dues; and the only question is as to the legality of that tax.

The coal boats, with their cargoes, came from other States, principally from Pennsylvania; and they were moored in the river in front of the property of Fortier, in the Sixth District of the city, at a distance of several miles above the wharves and landing-places at which cargoes are received and discharged. At this locality the city has constructed no works, made no landing-place, expended no money. The coal is neither sold nor discharged there; and all that is required is suitable check-posts, to which the boats may be fastened, so that they may be safely kept, where they in no manner obstruct navigation, until sales are effected, when they are removed, and taken elsewhere for discharge and delivery. The necessary check-posts have been and still are furnished and planted by Fortier, the front proprietor.

The tax is two cents a foot on each boat for fifteen days, and the aggregate amount on the fleet of coal boats usually moored in this vicinity would be several thousand dollars annually.

By the acts of Congress under which Louisiana was admitted into the Union the Mississippi river was declared to be a public highway, "and forever free, as well to the inhabitants of said State as to the inhabitants of other States and the Territories of the United States, without any tax, duty, impost, or toll therefor, imposed by said State: and these provisions shall be considered, deemed, and taken as fundamental conditions and terms upon which the said State is incorporated in the Union." Act of 1812, section one. 2 Statutes at Large, p. 703; Act of 1811, same vol., p. 642.

The Civil Code is to the same effect. It declares the navigable waters of the State public highways; and gives to every one the right to use the banks freely, to land his vessels there, and to make them fast to the trees which are there planted. R. C. C. articles 453, 454, 455.

This whole subject was considered by the Supreme Court of the United States, in *Cannon vs. the City of New Orleans*, 20 Wallace, 577, as it has been in other cases, in that court and in our courts. The doctrine is plainly laid down, and it is perfectly settled, that the front proprietor, whether an individual or a municipal corporation, may construct wharves and landing-places for the convenience and safety of vessels in receiving and discharging cargoes; and if the owners of such vessels choose to use such wharves and landing-places, they are bound to pay reasonable compensation for such use. The only ground on which any sum can be claimed by the front proprietor from the owners of vessels for mooring at the banks of public navigable waters, and there discharging and receiving cargoes, is that such proprietor by the expenditure of money and labor has constructed and maintains works which facilitate the discharging and receiving of cargoes, and afford to vessels the means of mooring and remaining in security.

The proof is clear, in this case, that the city has done no work, has expended no money, at the place at which these coal boats were moored, to authorize any tax on them, or to require any pay or compensation for the use by them of the river or its banks.

We agree with the justice who tried this case, that the ordinance which subjects to wharfage and levee dues vessels lying at the place at which these coal boats were moored, is the imposition of a tax without any corresponding benefit in the way of facilities for landing. Such a tax is beyond the power of the municipal government; and it can not be enforced.

The judgment appealed from is therefore affirmed, with costs.

No. 7108.

JAMES O. FOX ET AL. VS. WM. McKEE.

A lessor may consistently demand in one action the dissolution of the lease, and rent up to the moment the defendant surrenders possession of the leased property.

Where a lessee contracts to pay five per cent attorney's fee on the amount of the rent for the whole term of the lease, in case it becomes necessary for the lessor to sue, and the lessor subsequently sues for and obtains a decree dissolving the lease, the lessee can be held for only five per cent attorney's fee on the rent which had accrued at the time the dissolution of the lease took effect.

A lessor may in one action sue his lessee on two separate leases of two pieces of property, and may provisionally seize any effects on the two premises subject to his privilege.

The failure of a lessee to pay the rent agreed on at the time stipulated in the lease, authorizes the lessor to demand a dissolution of the lease.

Before a lessee can recover damages for any disturbance of his possession or enjoyment of the leased property by a third person, he must give personal, formal notice to the lessor of the disturbance, and call the latter in warranty.

Mere failure to pay an installment of rent the day it is exigible will not warrant a provisional seizure when it appears that the accrued rent was tendered a day or two after it was due, and before the writ of provisional seizure issued.

For a wrongful provisional seizure of his effects, a lessee may recover only such damages as he shall prove he has suffered in consequence of the seizure.

A PPEAL from the Sixth District Court, parish of Orleans. *Rightor, J.*

Thos. M. Gill for plaintiffs and appellees.

W. L. Thompson and *C. McRea Selph* for defendant and appellant.

The opinion of the court on the original hearing was delivered by DEBLANC, J., and on the rehearing by SPENCER, J.

DEBLANC, J. This suit is brought by plaintiffs to dissolve two leases from them to defendant, of certain properties owned by them in Algiers, and made for the space of five years, one from the 1st of August 1876, the other from the 1st of January 1877. The cause alleged to obtain

that dissolution is that defendant has repeatedly failed to comply with his obligations as a lessee, and to pay—at the dates fixed by his contract—the instalments of the rent agreed upon.

At the date of the institution of this suit, there was due but one instalment of three hundred dollars, for the quarter which ended on the 31st of August 1877.

In their petition, filed on the 3d of October 1877, plaintiffs allege that they had good reason to believe that their lessee would remove from the rented premises the property and effects subject to their lien, and they accordingly prayed :

1. That said property and effects be provisionally seized to secure their claim.

2. That the two contracts of lease be dissolved.

3. That McKee be condemned to pay them the rent then due, and all other and further sums, at the rate of three hundred dollars by quarter, as long as he will retain possession of their property, and—besides—five per cent for attorney's fees, in conformity to one of the stipulations contained in each of the leases.

The provisional seizure applied for was ordered and executed, and the property seized bonded by McKee, who excepted to the proceedings directed against him, on the grounds:

1st. That plaintiff could not, in one action, sue upon two separate and distinct leases of two pieces of property.

2d. Nor provisionally seize property on leased premises, in a suit where separate premises were rented under separate leases, etc., etc.

The exceptions were overruled, and the defendant answered, reserving his right to urge the same exceptions :

That he leased the batture property described in plaintiff's petition:

1st. For landing boats and timber ;

2d. For building steam-ways for hauling boats and other water craft, out, and repairing them.

3d. That his steam-ways cost him four thousand dollars.

4th. That he never violated the lease, but had tendered the rent money sued for, viz \$300, to one *Vincent*, the authorized agent to receive the same, who declined to accept it ;

5th. That the \$300, for the rent due August 31st, 1877, the very amount sued for, and which was tendered to *Vincent*, was deposited with the sheriff.

Thus far as answer; defendant then claims, in reconvention, damages in the sum of twenty-five hundred dollars, for this :

1st. That David R. Fox, the agent of these plaintiffs did not quiet the defendant in the undisturbed possession of the property leased,

from the unlawful infringement by one *George Shorey*, on the rights of McKee to the property leased.

2d. For the unlawful provisional seizure, obtained by plaintiffs, in this suit.

3d. For not defending McKee against the suit of *Shorey vs. McKee*.

4th. Because McKee has not been able to enjoy the use of the property leased, and the general misconduct of plaintiffs who combined to break the lease without legal cause or right.

Judgment was rendered in favor of plaintiff:

1st. Dissolving the leases.

2d. Evicting Wm. McKee of the leased property, and putting plaintiffs "in corporeal possession thereof."

3d. For nine hundred dollars, with five per cent interest per annum, on \$300, from September 1st, 1877, until paid; and like interest on like sum from the 1st December, 1877, until paid; like interest on like sum from 1st March, 1878, until paid, and

4th. For "*such other sums as may become due and owing at the rate of \$300 per quarter,*" "as long as the defendant remains in possession."

5th. Condemning defendant to pay five per cent attorney's fees on six thousand dollars.

6th. Recognizing plaintiff's lien and privilege as landlord on the property herein provisionally seized.

In the record filed in this court, we have found sixty-six mentions of sixty-six objections urged during the course of the trial, against the introduction of evidence, and which testify of the zeal and vigilance with which this case was prosecuted and defended.

Defendant's exceptions to the form of plaintiff's action were properly overruled. Though based on different leases, that action in those parts which are excepted to, does not contain inconsistent demands, contrary to or exclusive of each other, and the provisional seizure ordered by the court was executed on none but the property and effects subject to the lien resulting from the two leases. C. P. 148-151.

Have plaintiffs shown sufficient cause for the dissolution of the leases? They have: it is true that, when this litigation commenced, defendant was owing but one instalment of the rent, but it is also true that he had not been very punctual in paying the others. The payment of the rent, not by fractions, not after repeated demands or the institution of a suit to recover it, but at the date fixed by the contract, and in its entirety, is—on the part of the lessee, an obligation which he can neither avoid nor postpone; and if—through negligence or for want of funds—he fails to comply with that obligation, his failure justifies the dissolution of the contract.

Rev. C. C. 2046—10 L. R. 22—1 A. 422—14 A. 432.

Can the plaintiffs claim the dissolution of the leases, and—besides—that defendant be condemned to pay them from and after that dissolution, in accordance with the terms fixed in the leases for the payment of the rent, from quarter to quarter, until delivery of the leased premises, a sum corresponding to that which the lessee had to pay during the existence of the dissolved contracts? They can not: as remarked by Mr. Justice Slidell—the organ of this court in “Sign vs. Lloyd”—that relief is given by our Code in a single case: *if the lessee makes another use of the thing than that for which it was intended*, and if any loss is thereby sustained by the lessor, the latter may obtain the dissolution of the lease. The lessee—in that case—shall be bound to pay the rent until the thing is again leased out, etc. Immediately succeeding this article of the Code is the following: “The lessee may be expelled from the tenement, if he fails to pay the rent when it becomes due.” But no provision is made as to loss, by delay in re-letting.

C. C. 2681 (2711) 2682 (2712)—1st. A. p. 421, 422, 423.

The court further said: “It is to be remarked that, whatever apparent equity there may be in the view presented by the plaintiffs’ counsel, the omission to provide such relief as he asks cannot be considered as accidental. Our Code—in the great mass of its provisions—follows the Code Napoleon. That Code contains an express provision on this subject, which the compilers of our Code have thought proper to omit, *‘except in a special case.’*”

1 A. p. 422.

There is, in the two acts of lease a clause which we hereby transcribe: “The lessee binds himself to pay all attorney’s fees in case it should be necessary at any time to sue for the collection of the rent or any part thereof, or to *enforce the conditions* of this lease: the said attorney’s fees to be fixed at five per cent upon the full amount for which the property is leased, from the beginning to the expiration of said lease.” One of the express, though unnecessary conditions inserted in the act of lease is “that the lessor reserved the right to cancel it for any failure to comply with its terms.” The lessee by failing to pay at the time agreed upon, has himself authorized the action to cancel the contract, and he must bear an expense, the proportion of which he has himself fixed. He is not, however, liable for a commission on both the full amount for which the property was leased, and on every fraction which the plaintiffs claim as now due and to become due of the aggregate amount. Only one suit has been brought, and—for the attorney’s fees in that suit, only one commission can be allowed, and that is three hundred dollars.

In our opinion, plaintiffs are entitled to a judgment against defendant, dissolving the two leases and condemning said defendant to pay

them for rents—but only whilst the relation of lessors and lessee continued between them, that is until the 16th of March 1878, when the leases were dissolved, the sum of nine hundred and fifty dollars, three hundred of which were deposited with the sheriff on the fifth of October 1877, and, for attorney's fees, five per cent on six thousand dollars, the full amount for which the property was leased.

Defendant claims in reconvention, against the plaintiffs the sum of twenty-five hundred dollars, for the alleged reasons that they have not protected him in the possession of the leased premises, that they have combined to violate their contract with him, and that their provisional seizure was causeless and unlawful.

It was not shown that defendant's possession of the premises, as delivered by the lessors and within the limits designated by them and which—for years—have been recognized by those who live in that neighborhood, has been interfered with or disturbed. It does not satisfactorily appear that Shorey was claiming any right to the leased premises, or within its recognized boundaries. If otherwise, McKee was bound to apprise his lessors of that fact by personal notice, to call them in warranty, and—by his neglect so to do—he has lost his recourse against them for the damages which may have resulted from the pretended disturbance. We do not consider as a sufficient notice of that disturbance, McKee's conversation with one of the plaintiffs, in which he called his attention to a steamer lying partly in front of the leased property and which—it seems—had been there tied up by Shorey—for, in that conversation McKee intimated that he would take charge of the matter and cause Shorey to move off.

C. P. 48, 43—C. C. 2703 (2673) 2704 (2674).

This court has often decided that the lessee's failure to pay the rent constitutes a good reason for the lessor to apprehend that the property, subject to his pledge *may be* removed from the premises leased. 8th A. 366, 374. That was and is the strictest construction that could or can be placed upon the law, and—inasmuch as it has been adopted for upwards of twenty-five years—we adhere to it; but we are not inclined to extend it and to hold that the lessor has the right to provisionally seize the effects of his tenants, for the only reason that the rent was not paid on the day fixed in the lease, and though the next day or before the seizure the tenant offers to pay and the lessor refuses to receive the amount of the rent. Under such circumstances, the failure to pay authorizes the dissolution of the lease, but does not authorize the provisional seizure.

McKee, though willing, was unable to punctually comply with his obligation, but did in no way attempt to avoid it, or remove from the premises any of the effects subject to his lessors' pledge. On the 17th

of September, he sent one of his employees to pay the rent then due, to the agent designated by plaintiffs to receive it, and that agent informed the employee that his instructions were to refuse the amount of the rent, if tendered after the 15th. The tender was informally made, emphatically refused, and—shortly after—the provisional seizure was applied for, granted and executed. That provisional seizure was wrongfully obtained, and those by whom it was obtained are personally responsible for the damages which it has caused to the defendant.

C. P. 295.

What damages did he prove that he has suffered? He claims, in his answer, that he was damaged in the sum of twenty-five hundred dollars, and—as a witness, he swore—on the trial—that he has lost, on account of his alleged disturbance and the seizure, from five to eight thousand dollars. If less than a manifest exaggeration, this is certainly a mistake.

The seizure was executed on the 4th, released on bond on the 5th of October. He did not prove that, thereby, his credit had been either materially or otherwise affected—he did not prove what expenses he has incurred, and—under the only evidence which we can legally consider—we believe that, for the inevitable troubles and costs which that causeless and wanton seizure has entailed upon him, he is entitled to neither less nor more than three hundred dollars. C. P. 295.

It is—therefore—ordered, adjudged and decreed that the judgment of the lower court is amended, the leases of the 1st of August 1876 and 1st of January 1877 dissolved, and that—after deduction of the damages allowed to defendant, and which we compensate against the amount allowed to plaintiffs for their counsel's fees, they—the said plaintiffs—recover of said defendant, for rent, the sum of nine hundred and fifty dollars, with legal interest thereon as follows, to wit: on three hundred dollars, the amount deposited in court from the 1st of September 1877 to the 5th of October of that year—on a like sum from the 1st of December 1877—on an additional and like sum from the 1st of March 1878, and on the sum of fifty dollars, from the dissolution of the leases, on the 16th of March 1878.

It is further ordered, adjudged and decreed that all other moneyed demands of plaintiffs against defendant and of the latter against the former are hereby rejected—and that, as thus amended—the decree appealed from is affirmed: the costs of the appeal to be paid by plaintiffs.

ON REHEARING.

SPENCER, J. A reconsideration of this case induces us to modify our previous decree to some extent.

It is true, as stated in our former opinion, that upon dissolution of the lease, for other cause than that of misuse of the property, the tenant is not liable for rent until the property is re-let. But that is not the case before us.

Plaintiffs demand the dissolution of the lease, and rent up to the time that defendant surrenders possession to them. There is nothing inconsistent in these two demands, as was expressly decided by this court in *Dubois vs. Xiques*, 14 An. 428. It is but equitable and just that defendant should pay for the use of plaintiffs' property during the time he occupies it—the rent fixed by the contract being taken as the best proof and measure of the value of that case. The court *a qua* so decided. The defendant agreed to pay as attorney's fees five per cent on the whole amount of rent, "from the beginning to the expiration of said lease," in case of resort to law to enforce any of the rent demands or conditions of the lease. This, to say the least of it, was an onerous exaction; but it is "so nominated in the bond." The plaintiffs must have their "pound of flesh" but *no more*. The plaintiffs, by their own demand, voluntarily put *an end* to this lease by the decree in this case, rendered on the twelfth day of March, 1878, which retroacts and relates back to the date of bringing this suit, to wit: fifth day of October, 1877. The date of the expiration of the leases therefore was said last named day, and the five per cent attorney's fees must be computed on the whole amount of rent from the beginning to said expiration of lease. This makes the attorney's fees \$57 08, instead of \$300, as heretofore fixed. We see no reason to modify our former conclusions in any other respect than as above indicated.

It is therefore ordered, adjudged, and decreed that our former decree herein be set aside; that the judgment appealed from be amended, by reducing the sum allowed plaintiffs as attorney's fees, from \$300 to (\$57 08) fifty-seven 8-100 dollars, and by allowing to defendant on his reconventional demand the sum of three hundred dollars to be credited to him as of date fifth day of October, 1877; that in all other respects said judgment be affirmed.

That defendant pay costs of the court below and plaintiffs those of this appeal.

No. 7084.

MARTIN LANNES ET AL. VS. JEAN COUREGE ET AL.

A depository has a right to sue for and recover property fraudulently and surreptitiously taken from him.

One having a joint interest may proceed alone to recover possession from a mere trespasser.

An affidavit which verifies the necessary allegations in the petition for writs of sequestration and injunction, is sufficient to maintain the writs.

Allegations showing right of possession in the plaintiff and wrongful possession of defendant, and the fear of plaintiff that defendant will part from the property, are sufficient facts to warrant a sequestration.

The fact that defendant, has sued on certain promissory notes, and filed them in court as evidence of the claim sued on, will not prevent the plaintiff, who has a right to their possession, from sequestering them.

The Third District Court for the parish of Orleans has no authority on the application of one party to enjoin another party from prosecuting suits brought by him in a justice's court against third persons, and to which the one asking for the injunction is not a party.

The fraudulent possessor of a note may be enjoined by its legal custodian from using the note as evidence in a suit brought on it by the fraudulent possessor.

One who has the right to a separate action for the recovery of property, is not obliged to intervene in a suit between other parties involving the property.

A PPEAL from the Third District Court, parish of Orleans. *Monroe, J.*

Sambola & Ducros for plaintiffs and appellees.

Frank D. Chretien for defendants and appellants.

The opinion of the court on the original hearing was delivered by SPENCER, J., and on the rehearing by MARR, J.

SPENCER, J. Plaintiffs allege that they, together with one Jean M. Berthin, constituted a committee on behalf of an Association of Butchers, doing business at certain *public* markets in New Orleans, and formed with the view of suppressing private markets by judicial proceedings; that said committee was charged with the duty of collecting money and obtaining notes from the public butchers, for the sole purpose of defraying the expenses of the contemplated judicial proceedings; that for said purpose they obtained from various butchers their promissory notes (a list of which is annexed to petition), payable in December, 1874, to the order of and indorsed by said Berthin, with the distinct understanding between the makers of said notes and said committee that said notes should not be paid or used, unless all private markets were effectually and permanently closed prior to their maturity; that petitioners as such committee promised and agreed to surrender to said makers said notes, if said results were not attained; that the effort to close the private markets failed, and that it is the duty and obligation of petitioners to return said notes to said makers; that said notes, from their dates

to December, 1875, remained in the possession of said committee, and in the office and special charge of said J. M. Berthin, in New Orleans, as worthless paper. That one Jean Courege, in December, 1875, and January, 1876, obtained possession, surreptitiously, fraudulently, and without legal right or consideration, of 137 of said notes, aggregating in amount \$5100. That he kept private secret possession of said notes until lately, when he entered suits in the Fourth Justice's Court on thirty-eight of said notes against the makers thereof, alleging himself to be owner thereof, and is seeking by said suits to collect the said notes. They aver their right of possession of said 137 notes, and their duty and obligation as depositaries to restore them to the makers under the said agreement. They therefore bring this suit in the Third District Court, pray that said 137 notes be sequestered, and restored to their possession; and that said Courege be enjoined from disposing of any of them, and be enjoined from prosecuting said thirty-eight suits in the Fourth Justice's Court, and that said Fourth Justice's Court be also prohibited and enjoined from proceeding further therein, until the rights of plaintiffs be determined, etc.

Upon oath and bond, the writs of sequestration and injunction issued as prayed for.

Jean Courege excepted *in limine* as follows:

1. "That the said petition discloses no cause or right of action in the said plaintiffs.
2. "That the affidavit for the injunction and sequestration therein obtained is not sufficient and not in accordance with law.
3. "That the allegations in the said petition do not disclose sufficient grounds for an injunction and sequestration.
4. "As to the thirty-eight notes referred to in plaintiffs' said petition, and now pending in suits before the the Fourth Justice of the Peace Court, he especially excepts to the above petition for the reasons:
 1. "That the court was without authority to enjoin the plaintiff in the prosecution of these suits.
 2. "That the notes could not be sequestered in the hands of the judge of said court, thus divesting the court of a jurisdiction of which it was already seized.
 3. "That the right to prosecute a lawsuit, whether well founded or not, is a right guaranteed by article ten of the constitution.
 4. "That if the plaintiffs in the above suits have any interest in the said thirty-eight notes they could have joined either the plaintiff or defendants in the said suits by third opposition and intervention."

We will notice these exceptions in their order:

First—The petition, if the facts stated are true (and for the purposes of this exception must be so considered), discloses a clear right in

plaintiffs, as depositaries, to recover the possession of property fraudulently and surreptitiously taken from their custody. C. P. 15; 10 An. 552; 10 M. 465; 4 M. 619; 3 L. 216; 4 An. 178; 7 An. 110; 2 N. S. 20; 1 An. 48.

The fact that Berthin, one of the committee, does not or will not join them in the demand, does not prevent the others from proceeding to protect themselves from the acts of a spoliator. One having a joint interest may proceed alone to recover possession from a mere trespasser.

Second—The affidavit verifies the facts charged in the petition, and is sufficient to maintain the writs of sequestration and injunction.

Third—The allegations showing plaintiffs' right of possession and the wrongful possession of defendant, and the fear of petitioners that defendant will dispose of the notes, etc., are sufficient to maintain the sequestration, and the injunction, at least and certainly so far as concerns the ninety-nine notes not sued upon in the Fourth Justice's Court.

Fourth—We do not see how the fact that defendant had filed thirty-eight of the notes in question in suits by him brought in the Fourth Justice's Court can prevent plaintiffs from asserting their rights of possession thereof and upon proper affidavit and bond sequestering them. If defendants' proposition be true, one who has stolen a note can retain possession of it by simply suing on it. The sequestration of these notes in the Fourth Justice's Court in no manner interfered with or divested the jurisdiction of that court in said suits. The notes were not in *custodiam legis*, in the sense contended for by defendant. The rule invoked by him is that when property is in custody of one court under its process, another court can not by its process interfere with such custody. There is no doubt of the correctness of this proposition. But these notes were not held under process of the Fourth Justice's Court. They were at most simply filed therein as the evidence of the claim sued upon. No law required them to be so deposited, being mere acts under private signature. C. P. 175. By simple leave of the court they could be at any time withdrawn by Courege. Hence their sequestration was not only legal but necessary to the preservation of plaintiffs' rights. The law, C. P. 275, gives the right of sequestration whenever the ownership or possession of a movable is in controversy, upon the claimant making oath to his fears of its removal, etc. As these notes were not held under process of the justice's court, we can see no possible objection to their sequestration. Their production, if required in that court as evidence, could always be enforced by *subpena duces tecum* served upon the sheriff, or the plaintiff, if the latter has bonded them.

We agree with the judge *a quo*, that the plaintiffs can not enjoin the Fourth Justice's Court from hearing causes pending between the

defendant and other persons. It would lead to infinite confusion to allow one court to thus arrest litigation in another court, on the demand of persons not parties in such suits in such other courts.

We do not think that section 2013 of Revised Statutes applies to a case like this, but is intended to enable the Third District Court to exercise its appellate jurisdiction over justices of the peace in the parish of Orleans. We think, therefore, that so far as plaintiffs seek to enjoin the Fourth Justice's Court from hearing, and the defendant from prosecuting, his suits, the court *a qua* properly refused the application. But if it be true, as alleged, that the defendant is a spoliator of said thirty-eight notes, and obtained their possession fraudulently and surreptitiously, and that plaintiffs are entitled to their possession, we think the defendant may well be enjoined and prohibited personally and individually from using said notes as his own or as evidence of a right in himself.

Plaintiffs are not obliged to file interventions or oppositions in said thirty-eight suits. It is not a proper case for third opposition, and nobody is obliged to intervene in a suit; for the simple reason that he who has a right of intervention has a yet more evident right to a separate action.

Defendant's exceptions should have been overruled, except to the extent stated.

It is therefore ordered and decreed that the judgment appealed from be modified and amended so as to read as follows:

It is ordered and decreed that defendant's exception to the sufficiency of plaintiffs' petition, and to their demand for sequestration of the notes in controversy, be overruled. That defendant's exception to the injunction sued out by plaintiffs be overruled, except in so far as said injunction prohibits the Fourth Justice's Court from hearing, and the defendant from prosecuting, said thirty-eight suits—and to that extent only said exception is sustained, and said injunction dissolved. But the right of defendant to prosecute said suits shall not authorize him to make use of said notes as evidence or otherwise, such use being within the prohibitions of the injunction as herein maintained. It is further decreed that defendant and appellee pay costs of appeal.

DISSENTING OPINIONS.

EGAN, J. In my opinion it is well and properly settled that a writ of sequestration will not lie to seize and take any property or thing at the time in *custodiam legis*, or on file or deposited for use in a suit in another court. The fact that it was not necessary under the law for Courege to file the notes in controversy with the justice does not al-

ter the case, as whether necessary or not *he did so file them as the basis of the several suits* and they were in the lawful custody of the justice and could not be taken therefrom by the sheriff under the sequestration in this case, which would have been ineffective without so taking them. It is true that the notes might have been withdrawn by Courege *with leave of the court*, but not otherwise, whether filed in that or any other court. It is, however, not the practice or the law that the plaintiff who has filed a *private or other writing* in any court can take it from the records without leave, and so long as we recognize the jurisdiction of courts, whether justices' or others, it would be subversive of all law and propriety to permit the process or orders of another court or its officers to disturb the lawful custody of any paper or thing in its keeping. It is not pretended that within the bounds of their authority or jurisdiction the fact that justices' courts are not courts of record makes any difference in this respect, or that there is any reason why they should not be respected within the scope of their jurisdiction and authority. I therefore think the sequestration was both *illegal and unnecessary*, and that the proper remedy was injunction operating directly upon the defendant Courege and directed to him. I do not think that the constitution or the law gives any man a right to sue on the note, or to recover the debt or property of another, who may therefore at any time on proper allegations and proof obtain and maintain an injunction from any court of competent jurisdiction to restrain the defendant from either suing, prosecuting suit upon, or in any other manner using or controlling promissory notes claimed to belong to the plaintiff in injunction, and from collecting and reducing into possession by suit or otherwise the debt evidenced by the note. This was the view taken by us in the case of *Brown vs. Brown*, decided at this term, 30 A. I therefore dissent from the decree in this case maintaining the sequestration. On the other branch of the case, the injunction should be maintained as against the defendant personally, not only to the extent decreed, but to the full extent of preventing his making any use whatever of the notes in controversy or interfering with or using them in any manner and for any purpose, whether by suit or otherwise.

DEBLANC, J. I concur in the views of Mr. Justice EGAN as regards the invalidity of the sequestration resorted to by plaintiffs, and—in my opinion—their injunction is as invalid as their sequestration, in so far as they interfere with the suits already brought in the Justice's Court.

The relief to which plaintiffs consider that they are entitled, may be granted by, and should have been asked from the court in whose jurisdiction the aforesaid suits are pending. That jurisdiction cannot—le-

Lannes et al. vs. Courege et al.

gally—be invaded by the process of another Court, for the manifest purpose of suspending, embarrassing or preventing the trial of an already commenced and progressing litigation.

Had plaintiffs appeared in the Justice's Court and there asserted their right to the possession of the 38 notes sued upon by defendants, from the date of their demand not one of those notes could have been withdrawn from the files of that court without their consent. Their appearance in that jurisdiction would have secured every advantage which they could hope to gain by an order of sequestration obtained in another Court.

The Judge who has the undenied jurisdiction of a suit on a note, cannot be ordered by another judge to suspend his proceedings, until the latter ascertain whether the holder of said note is entitled to its possession. That question should be presented to and determined by the Court first seized of jurisdiction, on application of either the sued drawer of the note, or of those from whose possession it was unlawfully taken.

I respectfully dissent from the views and decree of the majority.

ON REHEARING.

MARR, J. If the allegations of the petition be true, the defendant, Courege, is attempting to practice a great fraud, through the medium of a justice's court. The defendant chose to put his case in the court below, on exceptions, which necessarily, *pro hac vice*, admitted the truth of the allegations contained in the petition.

It is urged that plaintiffs could not maintain this action because Jean Marie Berthin was one of the committee, of which the plaintiffs, eight in number, were members. But it is distinctly charged in the petition, that "they, said notes, remained in the possession of said committee, *your petitioners*, but in the office and special charge of Berthin * * * as worthless paper after their maturity." And again: "that your petitioners were the only persons entitled to the possession of said notes, and they only as a committee, and to return them to the makers thereof, which duty they now desire to perform." These allegations, which can not be called in question under the exceptions taken by defendant, show a perfect and exclusive right of action in the plaintiffs to recover possession of the notes; and to prevent the alleged fraudulent attempt of Courege to enforce them as valid obligations belonging to him. If the facts are not as thus charged, these distinct allegations must be put at issue by the defendant, as it is his right to do, in an answer to the merits.

If Berthin was a member of the committee, and entitled as such, equally with any one of the other members of the committee, to the possession of the notes, he could not control the other eight members. It was the committee, not one of its members, that was entitled; and if one should refuse to join the others in a proceeding to recover the possession, he could be made a defendant if he was a necessary party. But under the allegations of the petition for the purposes of the exception, no such question would arise.

It is true that each one of the makers of the 137 notes might, when sued, defend himself; but that is no reason why the committee, entitled to the possession for the purpose of returning them to the respective makers, should not sue to recover them for that purpose.

A district court would not be authorized, by injunction or other writ, to forbid a justice to hear and determine a case pending before him, and falling within his jurisdiction; but there are cases in which it is competent for one court, at the instance of one not a party to, but interested in a suit pending in another court, to deal with the parties to that suit; and, in aid of its own jurisdiction, to forbid them, by injunction, to proceed with their suit.

There were 137 notes in the possession of Courege; and he might have brought 137 suits against the makers of those notes. It was the right of plaintiffs, according to the allegations of their petition, to sue him for the possession of all of them: to sequester such as were in his possession, and to enjoin him from suing on them. It is true that plaintiffs might have intervened in every one of the suits; but they were equally entitled to sue and assert their rights in a single and separate suit, in a competent court. Their right was an entirety, the possession of all the notes; and the proof requisite to establish their right to one of them would suffice to establish their right to all of them. It would be a great defect in our jurisprudence if a person not a party to any one of 137 suits brought in a tribunal of inferior jurisdiction, having a right to the custody and possession of the subject matter of all these 137 suits, who could not assert his right in the inferior tribunal in a single action, could not go into a court of competent jurisdiction, and assert it in a single suit; and by the appropriate conservatory process of that court obtain the remedy and relief to which he is entitled.

Our decree does not enjoin the plaintiff from prosecuting his thirty-eight suits in the justice's court; but it does forbid him to use the notes as evidence in the suits, and for the very good reason that upon the allegations of the petition, the plaintiff in the thirty-eight suits is attempting to make an unlawful use of the notes to the prejudice of the rights of plaintiffs as asserted in their suit in the district court.

The sequestration need not take the notes out of the possession of

Lannes et al. vs. Courege et al.

the justice's court. They may be sequestered and detained in that court by proper notice served by the sheriff, on the justice, or his clerk: and the justice might well be appointed sheriff's keeper. If plaintiffs are entitled as they allege they are, to the possession of these notes for the purpose of returning them to the makers, their right would be of no avail if the plaintiff in the justice's court might withdraw them, and part with, or conceal, or dispose of them: or if he might proceed to judgment against the makers, and enforce it by execution.

Our decree does not invade the jurisdiction of the justice: it deals with a suitor in the justice's court, not directly in his relations toward the makers of the notes in the pending suits, but in his relations to the plaintiffs in the district court, touching the right to the possession and use of the notes, the subject matter of the suit in the district court.

It is no infringement of art. ten of the Constitution to say to a suitor, you shall not make any use of property the possession of which you obtained unlawfully, which you hold and detain unlawfully, and which you are attempting to use unlawfully to the prejudice of the right of another who invokes the aid of a competent tribunal to preserve and to enforce that right.

A careful re-examination of this case has but served to convince us that our original decree is correct, and it is therefore affirmed.

Mr. Justice DEBLANC adheres to the opinion expressed by him on the original hearing, and dissents as he then did.

No. 5599.

GEORGE W. BYRNE VS. THE HIBERNIA NATIONAL BANK.

The revocatory action can not be maintained by a creditor who not only fails to allege fraud, but who avers that his debtor parted from his property in error.

A party can not divest the averments of his petition of their force as judicial admissions by discontinuing the suit in which the petition was filed.

A creditor who has obtained possession of property of an insolvent debtor held in pledge by another creditor, by paying the debt due the latter, can not afterward sue to recover the money paid by him without offering to restore the pledged property.

The matters of defense that must be specially pleaded are those set up in avoidance, or extinguishment of an obligation admitted, or proved to have once existed.

Under the plea of the general issue, the defendant may prove any fact or circumstance which tends to show the non-existence, or falsity of the facts alleged by the plaintiff.

A voluntary party to an executed contract who has reaped and retains the profits of it, is estopped from assailing it as fraudulent.

APPEAL from the Sixth District Court, parish of Orleans. *Saucier, J.*

McGloin & Nixon for plaintiff and appellant.

Thos. Gilmore & Sons for defendant and appellee.

The opinion of the court was delivered by

SPENCER, J. In the year 1872, John J. O'Brien was a large dealer in provisions in the city of New Orleans, and kept a deposit account with the Hibernia Bank. In the latter part of September of that year, by connivance of the paying teller, he overdraw his account by some \$29,000.

The bank discovered this overdraft about the first of October, and at once demanded payment or security. O'Brien on that day executed in its favor an act of pledge of 337 casks of bacon.

In the next few days, and before O'Brien's failure (which occurred on the eleventh of October), 164 casks of this meat had been sold by brokers under the supervision and direction of O'Brien, and the proceeds of sale collected by the bank, and applied to said indebtedness, reducing the same to about \$4717 14. The bank also held a note of one Digges, indorsed or guaranteed by O'Brien, for \$2525 05. As stated, O'Brien went to protest October eleventh, owing about \$100,000. Among his largest creditors was plaintiff, Geo. W. Byrne.

On that day, October 11, the plaintiff, Byrne, and O'Brien called at the bank for the purpose of redeeming the property remaining in pledge in its hands. The bank furnished them a statement of O'Brien's indebtedness on that day, which, added to the Digges note, amounted to \$7242 19. Byrne at once paid the bank that sum, and took from it an order, or transfer, for the bacon remaining—173 casks—which he received and had sold for his own account and benefit, realizing for it several thousand dollars more than he had paid to the bank.

On twenty-ninth August, 1873, about eleven months after this transaction, Byrne brought suit against the bank to recover the amount he had paid, in this settlement, for the Digges note; alleging that it had been paid in error—in this wise: That he had entered into an agreement with O'Brien in October, 1872 (of which said bank was cognizant, and to which it became party), "whereby for certain considerations petitioner bound himself to pay said bank the amount due by said O'Brien as a depositor at that date for sums overdrawn from said bank." That the bank, knowing said Digges note was not embraced within the terms of his said obligation, fraudulently added its amount to the sum he had so agreed to pay it for O'Brien's account, and was therefore bound to refund the amount so overpaid, etc. That suit, No. 5347 of the docket of this court, was some time since decided finally against Byrne.

On sixteenth September, 1873, about eighteen days after instituting

Byrne vs. the Hibernia National Bank.

the above suit, Byrne brought the suit now before us against O'Brien and the bank. He claims judgment against O'Brien for \$30,662, balance due, as per statement and account annexed to the petition. In this statement O'Brien is charged with this sum of \$7242 19 paid the bank as hereinbefore stated.

It is charged in substance that the bank imposed upon and defrauded O'Brien, by inducing him to believe that he owed it a large sum, when in truth he owed it nothing. That it adroitly "saddled upon him" its claims against other recreant debtors, and thus procured and induced him to execute and sign, *in error*, the said act of pledge of October 1, 1872. That having thus fraudulently possessed itself of O'Brien's property, it rushed it upon the market and thereby sacrificed it, thus making itself liable to pay all of O'Brien's debts. The petition then goes on to say, hypothetically, that even if O'Brien did owe the bank, the contract of pledge was illegal and fraudulent, because it conferred a preference and had the effect of injuring the other creditors—the said O'Brien being at the time insolvent to the knowledge of the bank. It concludes with a prayer for judgment against O'Brien for \$30,662; also for judgment against the bank for same sum; that the contract of pledge be annulled, and the bank be condemned to restore all the property received thereunder, and in default to pay plaintiff's claim, etc.

There is nowhere in plaintiff's petition any direct or specific charge that O'Brien made the contract with intent or purpose to injure or defraud his creditors. On the contrary, the allegation is that he was deceived and imposed upon, and made the contract *in error* and *not in fraud*. It is not easy to reconcile these allegations with the requirements of the Code on the subject of the revocatory action. It is of the essence of that action, that the debtor intended a wrong. True, this wrongful intent is *presumed to exist*, wherever it is shown that an *insolvent* has made a contract prejudicial to his creditors; but that presumption of fraudulent intent is not so absolute that a party can not negative it by a *direct admission* to the contrary.

The plaintiff seems to have realized that these allegations were not supportive of, or in harmony with, the revocatory action; for he discontinued "all allegations and causes of action set up, except the revocatory action, and elected to prosecute said cause alone under the allegations tending to maintain such revocatory action." But this discontinuance did not strip these averments of their character and force as judicial admissions, which bind the party making them, unless alleged and shown to have been made in error, which is not pretended here.

But there are other and graver difficulties which oppose themselves to plaintiff's action.

When O'Brien went to protest on eleventh October, 1872, there

seems to have commenced a general "*grab game*" among his creditors, in which plaintiff, Byrne, played no insignificant part. Lawler got about \$8000 worth of meat; Vose about forty-four casks, and Byrne all that was left, some seventy casks. Byrne did more. He entered into an agreement with O'Brien, as we have seen, in order to get hold of the 173 casks in the bank's hands. By this agreement, he bound himself to pay up the deposit account and overdrafts of O'Brien in the bank, for which O'Brien had given the pledge of said bacon. In pursuance of this obligation he went with O'Brien to the bank, adjusted the account and paid it, taking a transfer from the bank for the 173 casks of bacon. Having paid this debt to the bank, for which he had bound himself with and for O'Brien, by said agreement, he was legally subrogated to the bank's rights (C. C. 2157, No. 3), besides holding its express order or transfer for the bacon.

Having thus obtained possession of the pledge, he enforced it by selling the property and appropriating the proceeds to his own use—realizing several thousand dollars more than he had paid out.

After having thus, subsequent to O'Brien's failure, bound himself for "certain considerations" to pay the amount due the bank under its pledge, after having gone to the bank, and adjusted and paid O'Brien's said debt according to his agreement, and obtained from the bank its pledge; after having thus acquired the bank's rights against O'Brien, and enforced them, to his own great profit and advantage, with what show of reason can Byrne now come, without even an offer of restitution, and demand the nullity of this contract, and claim from the bank not only the money paid it under his own agreement with O'Brien, but all else that O'Brien owes him—unless the bank surrenders to him 337 casks of bacon, more than half of which Byrne himself got possession of and sold? One occupying the position of Byrne in these transactions must go outside of a court of justice to enforce such demands. There is no allegation or pretense that he did not do these things with his eyes open, and after O'Brien's failure was "known of all men."

There was no bill of exceptions taken to the introduction of the record of the said suit No. 5347 in evidence. If there had been, we see no reason to doubt that it was admissible under the general issue. Under that plea the defendant had a right to show the falsity of plaintiff's allegations—that no obligation had ever existed on its part to plaintiff; that no right of action ever arose. The matters of defense which must be specially pleaded are those which are set up in avoidance or extinguishment of an obligation admitted or proved to have once existed. *Gleises vs. Faurie*, 6 L. 457; 9 L. 111; 5 R. 486.

The general rule is that special defenses waive the general issue. In other words, they admit the facts alleged, but set up another state of facts in avoidance.

Byrne vs. the Hibernia National Bank.

But when a defendant contests the existence of the facts alleged by plaintiff, the general issue is the proper plea; and under it he may prove any fact or circumstance which tends to show the non-existence or falsity of the fact alleged by plaintiff. Thus, in the case before us, the plaintiff seeks to recover of the bank, among other items, the said sum of \$7242 19. The bank introduces the record 5347 to prove that so far from the bank ever having owed him that sum, that the plaintiff had judicially admitted that he owed it to the bank, and that he had actually paid it, so that there never was in existence for one moment any obligation or any state of facts creative of obligation against the bank.

We hold, therefore, that Byrne having, after O'Brien's failure, and in order to secure advantage to himself, made himself party to the contract between the bank and O'Brien by agreeing to pay, and by paying the money due thereunder, thereby obtaining the bank's rights and possession of its pledge, selling the said pledge and appropriating its proceeds, can not now be heard to say that said contract was fraudulent and illegal.

This case impresses us very much as that of *Dwight vs. Bemiss*, 16 L. 149, did our predecessors. It seems to us that the plaintiff "was endeavoring to secure some thing from the wreck, and to obtain that preference for himself, which he complains of so much in others."

The judgment below gave plaintiff judgment against O'Brien, but rejected his demands against the bank. We think the judgment correct, and it is affirmed with costs.

No. 5797.

V. BACAS VS. J. HERNANDEZ ET AL.

The sheriff is not authorized to receive from the purchaser of property at a judicial sale the amount of the mortgage or privileged debts which rank the claim of the seizing creditor, and hence the sureties of the sheriff can not be held for the amount of such debts received and not accounted for by the sheriff.

APPPEAL from the Fifth District Court, parish of Orleans. *Cullom, J.*

M. E. Livaudais for plaintiff and appellee.

Ed. Bermudez and *T. Wharton Collens* for defendants and appellants.

The opinion of the court was delivered by

MANNING, C. J. A writ of *fieri facias* having issued in the case of *Macarthy v. Wiltz*, in 1866 Charles Bienvenu, in the capacity of sheriff of Orleans parish, seized certain property of the defendant, and after

due advertisement sold it to Mioton for twenty-seven hundred dollars. There were two mortgages on the property, both ranking the judgment of the plaintiff in execution. The first in rank, which was also a vendor's privilege, was that of Mrs. Bacas, the present plaintiff, and was for \$927.94. The second belonged to Mrs. Fortier, and amounted to \$1,428.89. The property therefore brought \$343.17 in excess of the amount of these two mortgages. Mioton, the purchaser, paid the whole of his bid to the sheriff, and the sheriff did not pay any part of it to Mrs. Bacas. She therefore took a rule upon him, or filed a third opposition in Macarthy's suit, asking to be paid by preference out of the proceeds of sale then in his hands, and there was judgment accordingly. No payment was made, and she now sues the present defendants, as sureties on the sheriff's bond, to recover the amount of her mortgage.

The defences are numerous, and are elaborately developed. Among them are the pleas that the bond was never accepted by the proper parties—that there were six sureties instead of two—that the bond was void, or at best inchoate, and a mere pollicitation—that the sureties were released by proceedings taken under an act of 1873 (Sess. acts, p. 123,) authorizing the Governor to cancel bonds, the proceedings being an application by Bienvenu to have his bond cancelled, made six years after Mrs. Bacas' judgment against him, and more than five years after his sureties had been cited in this suit, which application was favourably considered, and the bond actually cancelled by the then acting governor.

We do not think the case of the defendants is strengthened by these defences. This cannot be said however of the second ground, i. e. that Bienvenu, as sheriff, had no official capacity to demand and receive that portion of the price which belonged to those holding mortgages that ranked the seizing creditor, and therefore his sureties were not responsible therefor.

Whenever any property, sold by a sheriff, is subject to privileges or special mortgages in favour of other persons besides suing creditors, the sheriff shall require from the purchaser only the surplus of price beyond the amount of the privileges or special mortgages, Code Prac. art. 706, and the hypothecary action lies against the purchaser of such property in favour of creditors having such privileges and mortgages. Ibid. art. 709. The sheriff must give notice, before he commences the crying, that the property is sold subject to such privileges and mortgages, and that the purchaser is required to pay in his hands only the excess of the price, at which it shall be adjudicated, over those privileges and mortgages. Ibid. art. 679.

These provisions are very clear and unmistakeable. It is manifest from them that the sheriff is neither required nor authorized to receive

the amount of mortgages or privileges which prime that under which he is selling. His writ commands him to make a certain sum by and out of the sale of the property. The mortgages that are certified to him exhibit the sums for which the property is bound, and which must be satisfied, before the plaintiff in execution, whose writ he holds, is entitled to anything. If the price bid is insufficient to pay these sums, there can be no adjudication. *Ibid.* art. 684. If, as in this case, the highest bid exceeds the antecedent liens, the adjudication is valid and the sale complete, and the property passes to the purchaser, but passes, burthened with these antecedent liens, which can be enforced by the holders of them against the property in the hands of its new owner. All this is just, and is admirably contrived to prevent injury to debtor, creditor, or purchaser, and it follows from this, that when the sheriff takes upon himself to receive money which his writ does not authorize him to receive, his sureties are not bound for the consequences of an act which is outside of his official duty, and beyond his official authority. And such was early and emphatically declared to be the proper construction of the law. *Merchants' Bank v. Peters*, 2 Rob. 214 reaffirming *Pepper v. Dunlap*, 16 La. 163.

It is equally true that a purchaser cannot exonerate himself from liability by paying that which the law has expressly commanded him not to pay. He is not only permitted to retain, but he is required to retain in his hands the amount of the liens in advance of that of the seizing creditor (*Cummings v. Erwin*, 15 Annual 289) and the day to which the interest upon them is to be calculated for retention has been fixed. (*Firemen's Ins. Co. v. Gillingham*, 1 Rob. 305.)

These being the provisions of the Code regulating the conduct of all parties in judicial sales, how has the plaintiff conformed to them? It was said in oral argument that inasmuch as the property brought sufficient to pay the privileges and mortgages, antecedent to the judgment upon which the execution issued, the plaintiff conceived that she might as well claim her money out of the bid as to provoke another sale by hypothecary process against the property in the hands of the purchaser. And so she could, but the demand should have been made of that purchaser for payment out of the sum retained by him. If he refused, she had immediate recourse against the property. She chose apparently to abandon her right against the property, and recognizing the payment to the sheriff of her portion of the price as a "deposit for safe-keeping," (for that is the language of the Rule) she abdicates the high rank which the law assigned her, and descended to that of a claimant of funds, irregularly and unlawfully deposited with an officer who had no right to receive them. Whatever rights she may have against others, it is very clear that she cannot mulct the sureties of the

Bacas vs. Hernandez et al.

sheriff for her own error in proceeding against their principal to compel payment of that which the purchaser was compelled to pay her, or submit to have the property resold for the satisfaction of her claim. Therefore

It is ordered, adjudged, and decreed that the judgment of the lower Court is avoided and reversed, and that there be now judgment in favour of the defendants upon the demand of the plaintiff, and that the defendants recover of the plaintiff their costs in the lower court, and the costs of appeal.

No. 6885.

LUCIUS PHIPPS VS. MRS. RUTH SNODGRASS.

A citation addressed to the wife and "her husband," is a sufficient citation to the husband.

The one who pleads prescription must prove the facts necessary to sustain the plea. A plea to the jurisdiction of the court *ratione personæ*, must be made *in limine*. It is too late to file it after a judgment by default has been entered.

A PPEAL from the Fourth District Court, parish of Orleans. *Houston, J.*

Breaux, Fenner & Hall for plaintiff and appellee.

Frank W. Baker for defendant and appellant.

The opinion of the court on the original hearing was delivered by MANNING, C. J., and on the application for a rehearing by SPENCER, J.

MANNING, C. J. This suit was instituted by the holder of a promissory note, secured by mortgage, to enforce its payment against the maker. The citation is addressed to the defendant and her husband, and was served by leaving it at their domicile, by delivering it to a person above fourteen years of age there residing, they being absent. The defendant pleads that a citation addressed to her and her husband is not a citation to the husband.

We do not perceive any indefiniteness in such a citation. The insertion of the name of her husband would not make it more definite. She could have but one, and service upon him would have been sufficient. It was served upon both. *Gilmore's case*, 9 Annual, 197. Code Prac. 182.

A default was entered, and on same day an exception to the jurisdiction was filed. We must assume the default was taken before the filing of the exception. The judge would not have entered the default if an exception to his jurisdiction had been made, and that exception comes too late then, since it must be pleaded *in limine litis*. There was never any trial of it, and it is very vague in its terms.

At this stage of the case a petition was filed to remove it to the

Phipps vs. Snodgrass.

Circuit Court of the United States, on the ground that the plaintiff was a resident of Missouri and the defendant of Louisiana, and an order was made for its removal. The wife signed the bond, but her husband did not, and her signature without his authorization was nothing worth. There was therefore no bond, and the condition necessary to be performed to perfect the removal was never performed. No attempt was made to remove it. The suit remained in the State court, and it is of no consequence whether or not the clerk of the Circuit Court had authority to certify that the case had not been filed in his court. The fact was as he certified.

Notice was given the defendants that the default would be confirmed, and proof being submitted, it was confirmed, and judgment rendered in favour of the plaintiff for the amount of his note and interest, with recognition of his mortgage, and an order for its enforcement. No appearance was made by the defendants. They now urge that the mortgage is prescribed. If it is, it does not so appear, and would not matter if it did, so far as the mortgagor is concerned. The record does not shew when the mortgage was inscribed, and we cannot assume as a fact that which the defendants have neither attempted to prove, nor have proven.

The appeal is suspensive, and the plaintiff has prayed for damages, because it is frivolous. He is entitled to them.

It is ordered, adjudged, and decreed that the judgment is affirmed, and that the plaintiff recover of the defendants ten per centum upon the amount of the judgment of the lower court as damages for a frivolous appeal, and all costs.

ON APPLICATION FOR REHEARING.

SPENCER, J. There is but one ground we deem necessary to notice. We held in this case that it was too late, after judgment by default or answer, to plead to the jurisdiction of the court *ratione personæ*, the party being sued in New Orleans as an alleged resident of said city. We are aware that our immediate predecessors went, in effect, to the point of holding that a plea to the jurisdiction *ratione personæ* could be made at any time before judgment, and was good cause to annul after final judgment in the cause! See Richardson vs. Hunter, 23 A. 255; Alter vs. Pickett, 24 A. 515; 21 A. 258 and 551.

In our opinion such a doctrine is destructive of all certainty in judicial proceedings, subversive of elementary principles, and directly in conflict with numerous articles of the Code of Practice.

First. It is destructive of all certainty in judicial proceedings. A defendant is cited before a court having competency to try the subject matter, i. e., jurisdiction *ratione materiæ*. He appears, makes no ex-

ception to the jurisdiction, but answers to the merits, and contests vigorously the plaintiff's rights. Judgment is rendered against him below, and on appeal. Under the doctrine we combat he can at once turn about and sue to annul that judgment on the ground that he did not reside in the parish where he was sued. How would a suitor ever know when he had obtained a binding judgment against his debtor?

Second. The doctrine is subversive of elementary principles common to the laws of all civilized countries. It is elementary and can not be denied that the judgment terminates all questions which were or which could have been urged in defense. Yet, according to the doctrine of our opponents, it does not conclude the defendant from pleading to the jurisdiction of the court *ratione personæ*, although the Code says that exception or defense must be pleaded *in limine*, and before answer. Under this theory what becomes of the provisions of our law on the subject of *res adjudicata*? When and where will there be an end of lawsuits?

Third. It is directly in conflict with arts. 93, 333, 334, 335, and 336 of the Code of Practice. The first of these articles provides: "If one be cited before a judge whose jurisdiction *does not extend to the place of his domicile* or of his usual residence, but *who is competent to decide the case brought before him*, and he plead to the merits instead of declining the jurisdiction, the judgment given shall be valid, except the defendant be a minor." The other articles mentioned provide in effect that this exception to the jurisdiction *ratione personæ* must be pleaded *in limine* and before answer.

Have these plain and unambiguous articles of the Code of Practice been expunged from it? Are they no longer parts of the law of procedure in this State? We are told that they have been abrogated by article 162 of that Code; that article provides: "It is a general rule in civil matters that one must be sued before his own judge, that is to say, before the judge having jurisdiction over the place where he has his domicile or residence, and shall not be permitted to *elect any other domicile or residence for the purpose of being sued*, but this rule is subject to those exceptions expressly provided by law."

Is this article repugnant to articles 93, and 333, 334, 335, and 336 of the Code? Is there no interpretation that will harmonize them? If there is, elementary principles require us to adopt that interpretation, for they are all articles, and component parts of one statute.

Article 162 declares, in its first paragraph, that one must, as a general rule, be sued at his domicile; but article 93 declares that if one be *actually sued elsewhere*, and plead to the merits, without declining the jurisdiction, he shall be bound by the judgment. Art. 162 declares that there are *exceptions* to its rule. Art. 93 is one of those exceptions; and

Phipps vs. Snodgrass.

presents a wholly different case from that of last clause of art. 162, which provides that no one shall be permitted *to elect* any other domicile *for the purpose of being sued*. Is it not manifest that this clause relates to causes where parties by agreement and with a view to a *future suit* designate a place to bring it? Art. 93 relates to a case where a party *has already been sued*. The last part of art. 162 relates to cases where the parties elect domiciles for the purpose of *being sued in the future*. The "*election of a domicile for the purpose of being sued*" pre-supposes that the party has *not yet been sued*, and implies the *selection and designation* of a place of domicile for the purposes of a *prospective suit*. It is this last which the law forbids, and which is a wholly different case from that of art. 93, which provides for a *suit actually pending*, and where there has been no previous election, selection, or designation of a domicile for the purpose of bringing it.

The evils intended to be prevented by this provision of art. 162 are well known. It was to prevent hard-pressed debtors from entering into contracts whereby they waived their domiciles and elected in lieu thereof the counting-rooms of their merchants in New Orleans, designating some clerk of their creditor as agent, to receive service of legal process, and thereby in many instances being sold out of house and home before they knew suit had been brought. See *Marqueze vs. LeBlanc*, 29 A. 194, and *School Board vs. Weber*, 30 A. 595, concurring opinion of Justice SPENCER, where this question is treated more at length.

The rehearing is refused.

No. 6342.

THE STATE VS. J. J. DANIEL.

Before this court can pass on the question whether the lower judge rightfully refused to allow the change of venue asked for by a prisoner on trial for murder, the evidence on which the application for a change of venue was made must be brought before it in a bill of exceptions.

This court will only reverse the ruling of the lower court on the question of a change of venue when the evidence brought up in a bill of exceptions shows indisputably that the judge below has misapplied or arbitrarily violated the law. The clerical error of writing the word "parish," instead of the name of the parish in which the killing was done, in the copy of the indictment served on the accused, when the caption of the copy gives the name of the parish, is no ground for continuance.

The first section of act No. 45 of 1876, fixing the terms of the District Court for the Second Judicial District, is constitutional.

Where no fraud or wrong is shown, no objection of irregularity as to the drawing of the venire for a certain term of court will be sustained, if made after the first day of the term.

State vs. Daniel.

Since the passage of the act of 1873, (page 166, sections 2 and 15), the members of a police jury may be drawn as talesmen in criminal trials.

Dying declarations are admissible, whether made to an officer or private person, and whether verbal or written.

Declarations made under a belief of impending death are dying declarations, although the wounded man making them did not die until several days thereafter.

The fact that the accused offered no evidence on his trial does not give to his counsel the right to the closing argument.

The accused may be tried on a second indictment for murder when the first indictment was invalid.

In criminal cases no foreman need be appointed to the jury, and the verdict of the jury may be delivered orally and in open court.

A PPEAL from the Second Judicial District Court, parish of Jefferson.
Pardee, J.

A. G. Brice, District Attorney, and *H. N. Ogden*, Attorney General, for the State.

R. King Culler for defendant.

The opinion of the court was delivered by

DEBLANC, J. The charge against defendant is that—on or about the 21st of December, 1873—he killed and murdered one Joseph L. Cocke, in the parish of Jefferson. He was twice tried for this alleged crime, the first time on the 14th of January 1875, the second time on the 13th of April 1876. On each trial, the verdict against him was: "Guilty, without capital punishment."

He was twice sentenced to imprisonment at hard labor for life. From the decree based on the first verdict, he appealed, and was granted a new trial on the ground that some of the jurors by whom he had been indicted and tried were drawn from the Seventh District of the city of New Orleans, which had been taken from and had, then, ceased to be a portion of the territory of the parish of Jefferson.

He has also appealed from the decree based on the last verdict, and—to obtain its reversal—relies on many grounds, some of which are discussed at length and others submitted without discussion. The first in order is: that—on the trial of the prisoner's application for a change of venue—the Judge refused to have the witnesses' testimony taken down in writing. As to this refusal, the bill of exception merely recites that "defendant introduced nine witnesses to prove the allegations contained in his application, that they were received, sworn and did testify." Not even the substance of what they testified to is given or alluded to in the bill, at the foot of which the judge has appended the statement that "on the motion to change the venue, there was no exception to his ruling."

It is manifest that such a motion is addressed to exclusively the Judge, and that he alone can and must pass on the sufficiency or insufficiency of the grounds presented.

ficiency of the facts alleged and testified to: but, in criminal cases, to convey any proper and legal evidence from the lower to the higher jurisdiction, there is one, only one vehicle, and that is the bill of exception. If that taken by the prisoner's counsel, had reached us with a statement certified to by the judge, that—on the hearing of the application for a change of venue—nine credible and uncontradicted witnesses had been examined, and that every one of the nine had sworn that, by reason of prejudice existing in the public mind, the accused could not obtain an impartial trial in the parish of Jefferson, he would have presented a question of law resting on admitted facts, and that question we would have been bound to consider and decide.

We believe—as urged by defendant's counsel—that, in regard to such an application, the discretion of the judge is not unlimited; that, when the prejudice does exist, when its existence is proven, the accused has an absolute right to a change of venue, and that—from an improper denial of that right—he may appeal to this Court: but—to obtain it here—the bill of exception must show, by the recital of undisputed facts—that the judge has undoubtedly misapplied, or arbitrarily violated the law. Otherwise, our jurisdiction does not attach to the matter, nor to any of its branches.

Constitution of 1868, art. 74—20 A. 369—21 A. 290, 473—22 A. 38, 468—23 A. 148, 525—26 A. 543.

Driven from that well defended, but untenable position, defendant's counsel renews his attacks against, and assails the decree from nine other, and as untenable positions.

I.

On the 9th of March, 1876, this case was called for trial: the accused answered that no correct copy of the indictment had been served on him, and—for that reason—moved for a continuance. In support of his motion, he presented to the court the copy which he had received from the sheriff: instead of the word *Jefferson*, the word *parish* is therein written and repeated; it reads: "the grand jurors of the State of Louisiana, duly empanelled and sworn for the parish of "*parish*." This objection was properly overruled: in the margin of the copy of indictment served on and introduced by defendant, the caption is as follows: "Second district court, parish of Jefferson, State of Louisiana." The clerical error alluded to could—in no way—prejudice the defence, and—were it otherwise—the law now expressly provides "that it shall not be necessary to state any venue in the body of the indictment, but the State, parish, or other jurisdiction named in the margin thereof, shall be taken to be the venue for all the facts stated in the body of such indictment, etc." Besides, the record shows that—on account of the absence of the prisoner's witnesses—the trial was postponed until

State vs. Daniel.

the 8th of April, 1876, and that—in the mean time—another and correct copy was ordered to be, and was served upon him. In fact as in law, this first exception has no foundation.

Rev. Statutes, sect. 1062—8 R. R. 591—15 A. 495.

II.

The objection that the honorable Don A. Pardee—the presiding judge—was a resident of the Seventh District of the city of New Orleans, and not—as prescribed by the constitution—a resident of the district in which he exercised his functions, is not supported by the evidence. We have ourselves decided that the Seventh District of the city is embraced within the territorial limits of the Second Judicial District. *State vs. Williams*, 29 A. 779.

III.

On the 12th of April, 1876, the prisoner was brought to the bar of the court to stand his trial, and—for two reasons—protested against the declared intention to try him :

1. Because Act No. 45 of the Legislature, under and by virtue of which the court was then being held, was unconstitutional and void.

2. Because, in drawing the jury for that term, none of the formalities prescribed by Act No. 94 of 1873, had been complied with.

The title of the statute of 1876, is partly in these words ; “ An act to define and extend the limits of the Second Judicial District ; to fix the terms of the court therein,” and—by the first section of said act—the last-mentioned object of its passage was carried out and those terms fixed. Whatever may be the constitutional value of the other sections, the first one is certainly constitutional.

As to the pretended irregularity in the drawing of the jury, the judge's statement is that no evidence was offered by defendant to support that branch of his exception. It does not appear that he did, but he now refers to the list of jurors served upon him, and that list shows that said jurors were drawn on the third of April for the term which commenced on that day, but that they were to be called only from the tenth of said month. The jury should have been drawn not less than thirty, nor more than sixty days, before the commencement of the term ; but the very law relied upon by defendant expressly declares “ that all objections to the manner of drawing juries, or to any other defect or irregularity that can be pleaded against any array or venire, must be urged on the first day of the term, or all such objections shall be considered as waived, and cannot afterward be urged.” In this case, there is no charge that any fraud was practiced or great wrong committed, and the objection was raised nine days after the commencement of the term, two days after that on which the jurors had been summoned to appear and to serve as such. It was then too late.

Act of 1873, p. 169, sect. 12.

State vs. Daniel.

IV.

John Pierce, summoned as a talesman, claimed that—as a member of the police jury of the parish of Jefferson, he was exempt from jury duty. The court decided that he was not, and to its ruling on this point the accused excepted. We are referred by his counsel to section 2126 of the Revised Statutes, under which the exemption was claimed. That section, in this respect, was in conflict with, and was repealed by the act of 1873. The judge correctly held that—at the date of the trial—that privilege no longer existed. Act of 1873, p. 166, sect. 2 and 15.

V.

To the admission of the declaration made by the deceased, after he had been mortally wounded, the accused excepted on the grounds :

1. That it was not made to a sworn officer, and not reduced to writing.
2. That, as the deceased lived five days thereafter, his statement can not be considered as a dying declaration.

Whether made to a private individual or to a sworn officer, whether reduced to writing or not, such a declaration is admissible, and should ever be received to assist judges and juries in discovering how, where, when, why and by whom the deceased was killed. It was eminently right to attach an important value to the declaration of one who feels that he is near to his grave, almost in presence of his God.

It matters little that, after making his declaration, the wounded party survived several days. Howsoever long he may have survived, was the reported declaration made under the belief of approaching dissolution, under a sense of impending death, when the heart is justly presumed to be free from anger, hatred and falsehood? That is the only test, one which involves a question of fact.

5th Allen 495—11 Fred. 513—26 Gratt. 963—8 Smed. & Marsh 401—Archibold (8th ed.) p. 431, No. 1—Green's Com. Reps. 490—11 Ohio 424—35 Cal. 49—20 Ark. 36—26 Mich. 112—45 Vt. 308—32 Miss. 433—8 Blackf. 101—6 Parker 11—Wharton Am. Cr. Law 669, 670, 673—8 A. 514—10 A. 131—12 A. 274—13 A. 45—23 A. 558—8 How. 665.

The deceased's declaration is embodied in the bill of exception, and defendant's counsel insists that it proves absolutely nothing, or—at most—that defendant was absolutely crazy. What is it? Shortly after he had been wounded, the deceased said : "I am dying." Be quiet, he was told, and you will get well. He repeated : "I am dying, I will not get well." He was asked : what brought on the trouble, and did not answer. The witness then remarked : Daniel would not have done this without cause ; the deceased replied : Daniel got mad because I would not go with him to see about the wood, took his knife and stabbed me, that is all."

This proves that there are monsters in this world, and that, agaⁿst their imagined insanity, society should be protected.

VI.

On the part of defendant, no evidence was offered, and—on that account—his counsel claimed the right to close the argument to the jury. The right thus claimed has invariably been denied since the decision of this court in "State against Millican," reported in the 15th A. p. 557—Archibold, vol 1, (8th ed.) p. 551—1 Gratt. 557—10 Ohio, N. S. 598—48 Mo. 55.

These are the only points noticed and discussed in the brief submitted by defendant's counsel. Those unnoticed in the brief and urged in the motion to quash the indictment, are :

VII.

That the jury should have been drawn from the parish of Jefferson, as it was prior to the passage of acts 71 of 1874 and 45 of 1876, and when it embraced what is now known as the Seventh District of the city of New Orleans. On his first trial, the accused excepted to the venire, because the jurors had been partly drawn from said district, and our predecessors considering this as an error prejudicial to him, did, on that very account and at his own request, grant him a new trial. Though he might not have been concluded by the course which he then pursued, and as to this we express no opinion, he waived the presumed privilege by not asserting it on the first day of the term.

28 A. 38.

VIII.

That he should have been tried on the first indictment found against him, and could not have been—as he was—re-indicted for the same offence. The first indictment was—at least inferentially—declared by this court irregular and invalid, and the accused was properly re-indicted.

IX.

In the motion for a new trial, two of the grounds relied upon are : that no foreman was appointed to the jury by whom the prisoner was tried—that their verdict was orally rendered, and ascertained by asking them what their verdict was. In criminal cases the law does not require the appointment of a foreman, and it is sufficient that the verdict be delivered orally and in open court. This was done.

8 R. R. 513 and 518.

We have examined—with the care and attention due to this important cause—the several and exhaustive defences suggested by the remarkable zeal of the prisoner's counsel. Those defences, though as full and as subtle as they could have been made, can not prevail against the law.

There is no error in the judgment appealed from, and that judgment is affirmed.

No. 7062.

JACKSON & MANSON VS. H. M. HOFFMAN ET AL.

Where the parties to a suit in order to avoid further litigation agree to submit the adjustment of their differences to arbitrators, and the agreement to submit is couched in such terms as makes the extent of the arbitrators' jurisdiction a matter of doubt, the agreement will be construed by the light of the pleadings in the suit which was discontinued by the agreement, and all questions put at issue by those pleadings will fall within the powers of the arbitrators to decide.

The party in whose favor arbitrators have rendered their award may sue the debtor for the recovery of the award, or may exact from him the penalty stipulated for the non-performance of the award, but he can not demand both the award and the penalty, unless the penalty has been stipulated for mere delay.

A PPEAL from the Sixth District Court, parish of Orleans. *Rightor, J.*

Thos. Gilmore & Sons for plaintiffs and appellees.

J. L. Tissot and Hudson & Fearn for defendants and appellants.

The opinion of the court was delivered by

MANNING, C. J. This suit is for the enforcement of an award made under an arbitration.

Jackson & Manson instituted suit in 1875 against John Raymond and the defendant Hoffman to recover seven hundred and fifty five dollars for salt, which is alleged to have been sold to them, and "used in the course of their business and on a certain lot of hides especially, now on board the ship *Matura*." The petition also alleges that these two defendants have been doing business as commercial partners, buying and shipping hides, and judgment is prayed *in solido* against them. This suit was in the Fourth Court of this City, and several other parties had brought suits against the same defendants in that Court for the value of hides. Hoffman proposed to submit his liability in these suits to arbitration, which was agreed to on the part of the several claimants. Articles of submission were accordingly prepared and signed, and the sum necessary to pay the claims was deposited with E. M. Hudson Esq. Attachments had been taken out, from the Fourth Court, and the proceedings there were discontinued when the agreement for arbitration was made.

The articles of submission recite, that whereas certain suits have been instituted in the Fourth Court by attachment against Hugo M. Hoffman and John Raymond for the sums respectively claimed by the plaintiffs therein (and the names are set forth, and among them, Jackson & Manson), and whereas it is the desire of all parties, to determine the liability of Hoffman to these creditors growing out of the alleged partnership between him and Raymond, they agree to submit to arbitration the question whether Hoffman is indebted to these creditors, or

any of them, by reason of any partnership existing between him and Raymond, in consequence of any transactions between them in dealing in hides. It was further agreed that those who had brought suits against Hoffman should discontinue them, and double the amount of each plaintiff's claim was stipulated to be paid by either party cast in the award as a penalty for not executing it. This submission was signed May 18, 1875.

On the 31st of same month Messieurs Gilmore & Sons, attorneys of Jackson & Manson, addressed a letter to Messieurs Hudson & Fearn, attorneys of Hoffman, setting forth the substance of their demand against Hoffman, and adding ;—"The articles of submission prepared by you appear to submit the question whether Hugo M. Hoffman is indebted to us by reason of any partnership existing between him and Raymond, in consequence of any transaction between them in dealing in hides since March 1875. Inasmuch as we (trusting to your accuracy) signed the paper without examination, and as doubts may arise as to the extent of the submission, we wish it understood that the whole case as far as Jackson & Manson are concerned is embraced within its provisions, and is before the arbitrators. Desiring to hear from you on this subject, we are etc."

On the same day the attorneys of Hoffman replied ; "we understand the submission to arbitration to include the claim of Jackson & Manson against H. M. Hoffman as set forth in their petition filed in the Fourth District court."

The two arbitrators failed to agree, and an umpire decided that no copartnership existed between Hoffman and Raymond for the transaction of a general business in hides, and that the claimants for the value of hides sold to Raymond had no recourse against Hoffman, but that Jackson & Manson's claim for salt was good against Hoffman, because it was proved to have been used on the hides in the ship, and was to be paid for by Hoffman.

Hoffman refused to pay the sum awarded on the ground that the umpire had gone beyond the terms of the submission, which confined him to the consideration of the sole question, whether a commercial partnership existed between Raymond and Hoffman, and having decided that none existed, his power and authority were at an end.

We do not think so. The articles of submission must be read by the light of the antecedent occurrences that gave rise to the arbitration. Several suits were in progress in the Fourth court against Hoffman. Jackson & Manson's suit was for the value of salt used on hides already on shipboard. All the others were for the value of the hides. Attachments were sued out by all the claimants. Hoffman proposed an arbitration. It was accepted, and one of the stipulations in it is that

the suits shall be discontinued. They were discontinued—the attachments were removed—and the ship left with her cargo. Manifestly the arbitration was to take the place of the suits. The deposit of money was to take the place of the property attached. The questions submitted for arbitration were the claims set up in the suits, from whatever cause arising. The counsel on both sides so understood it. A letter of inquiry, occasioned by the peculiar phraseology of the submission, and written for the express purpose of avoiding any dispute about the matters included in it, was satisfactorily answered by the announcement that the submission did include all the matters included in the suit.

Hoffman now insists that he is bound only by the articles, which he signed, and not by his counsel's letter interpreting them. To which we answer, that we interpret the articles by the suit which was displaced in consequence of the submission. He procured the dismissal of the suit and its attendant process of attachment, and got his property beyond reach, and he cannot be heard now, when he claims that the umpire assumed to decide what was not submitted to him. The umpire decided what the Fourth Court would have had to decide, if the suit had gone on. The issues that were before that court were also before the arbitrators. The object of the arbitration was the determination of those issues.

The plaintiff has sued, not alone to enforce the award, but also to recover the penalty, and the defendant has even claimed the penalty in reconvention. The plaintiff's counsel has not even touched this point in his brief, and as it is by far the most important one in his case, would seem to have waived it, or not to rely on it. That a party can recover both the amount of an award, and the penalty for non-compliance with it, although the latter was not stipulated for mere delay, was held to be a correct interpretation of our Code in *Hunt v. Zunts*, 28 Annual, 500. Our examination of the provisions of the Code, has led us to a different conclusion.

The creditor can sue for the execution of the principal obligation, or he may exact from the debtor the penalty stipulated, but he cannot demand both, unless the penalty has been stipulated for mere delay. Civil Code, arts. 2120—1. new nos. 2124—5. Another article states that it is usual to undergo a penalty of a certain sum of money in the submission, which the person who shall contravene the award, or bring appeal therefrom, shall be bound to pay to the other who is willing to abide by it. Art. 3073 new no. 3106. But this does not countenance the idea that because the party who abides by the award can sue for the penalty, he shall also recover the sum awarded, and when read along with the two articles first cited, the recovery of both is expressly prohibited. The mention of a single case where both can be recovered,

Jackson & Manson vs. Hoffman et al.

i. e. when the penalty is for mere delay, excludes the construction that such recovery is permitted in any other. *Inclusio unius est exclusio alterius*.

"This penalty is stipulated with the intention of indemnifying the creditor for the non-performance of the principal obligation; it is consequently compensatory of the damages which he suffers from such non-performance. Hence it follows, that he ought in this case to elect, either to claim the execution of the principal obligation, or the penalty; that he ought to be satisfied with one of them, and that he cannot exact both." 1 Pothier Obligations, 281.

The judgment of the lower court was for the amount of the award. The plaintiff asks us to amend it by giving him judgment for the penalty in addition thereto. We do not think he is entitled to that. He has not abandoned his claim on the principal obligation, and elected to sue for the penalty. He can recover either the one or the other, but not both.

Judgment affirmed.

Rehearing refused.

No. 7103.

FACTORS' AND TRADERS' INSURANCE COMPANY VS. M. M. DEBLANC ET AL.

A judgment rendered by a court of competent jurisdiction against a defendant who was legally cited, and the sheriff's sale duly made in execution of that judgment, can only be attacked in a direct action to annul, brought in the court that rendered the judgment. Neither the judgment nor the sale can be assailed collaterally.

The adjustment of conflicting mortgage claims falls within the jurisdiction of the court from which the process issued under which the sale of the mortgage property was made.

One who claims the proceeds of a judicial sale, thereby makes a judicial admission that the sale was valid. He is therefore estopped from attacking the sale as a nullity, unless he proves that his admission was made through error of fact.

One who judicially asserts a fact as the basis of a right touching the matter in controversy, can not afterward change his position, and assert the contrary.

The rights and claims of concurrent mortgagees, where a valid sale of the mortgage property has been made, is restricted to the *pro rata* distribution of the proceeds.

A PPEAL from the Fourth District Court, parish of Orleans. *Houston, J.*

Gibson & Gibson for plaintiff and appellee.

Sambola & Ducros for defendants and appellants.

The opinion of the court was delivered by

MARR, J. In June, 1871, the Factors' and Traders' Insurance Company recovered judgment in the Sixth District Court, with recognition

of mortgage and privilege, against Laure Blanque, on her three promissory notes, one for \$3000 and two for \$2250 each, with interest, the first secured by a mortgage dated fifth September, 1865, the others by a mortgage dated fifteenth February, 1869, on the same property, the undivided interest of the mortgagor in certain houses and lots in New Orleans, which she held in common with her co-heirs.

Laure Blanque set up formidable defenses to this suit, charging fraud and an abuse of his trust by her agent who executed these notes and mortgages; and she appealed from the judgment against her. This court reversed the judgment; but, on rehearing, set aside its original decree, and affirmed the judgment of the district court, on the ground that the giving of the notes and mortgages was authorized by the power; "and that was all that the lender (of the money) had to be satisfied of." See decree, fourth January, 1875, No. 3485 of the docket, not reported.

On this judgment execution issued: the mortgaged property was seized and offered for sale; and, two thirds of the appraisement not having been bid, it was sold on the twenty-fourth April, 1875, on twelve months' credit, and adjudicated to the plaintiff in execution, the Factors and Traders' Insurance Company.

On the twenty-second April, two days before this sale, Mathieu M. DeBlanc filed his petition of intervention and third opposition, alleging that he was holder and owner of two of the three notes secured by the mortgage of fifth September, 1865, one for \$400, the other for \$600; and of two other notes, one for \$600, secured by a mortgage of thirteenth March, 1868, and one for \$2000, secured by a mortgage of twenty-second April, 1868, all resting on the same property; that the note for \$3000, one of those on which the plaintiff in execution had obtained the judgment under which the sheriff was about to sell the mortgaged property, was paid by the maker at maturity, and the mortgage by which it was secured extinguished *pro tanto*; and that the mortgages securing the notes held by opponent were superior in rank to any that plaintiff may have on the property. He prayed that the sheriff be ordered to retain in his hands, subject to the order of the court, the proceeds of the sale; and for judgment ordering the payment of the aggregate sum due him out of the proceeds, in preference to plaintiff, and all other creditors.

The court granted the order, requiring the sheriff to retain out of the proceeds a sufficient amount to satisfy opponent's claim, "until further orders." The plaintiff company put this opposition at issue on the seventh May; and on the sixth January it was discontinued, on motion of opponent's attorneys.

On the same day that this discontinuance was entered in the Sixth District Court, DeBlanc filed a petition in the Fourth District Court, and

obtained a writ of seizure and sale on the notes and mortgages set up and described in this intervention and third opposition: and the sheriff seized and advertised the property for sale, ignoring the previous sale and adjudication to the Factors' and Traders' Company.

On the fifteenth January DeBlanc took a rule on the Recorder of Mortgages and the Insurance Company to show cause why the mortgage of fifth September, 1865, should not be canceled and erased, so far as the \$3000-note was concerned, on the ground that it was paid to the original mortgagee at maturity.

This rule was put at issue by exception and answer; the insurance company alleging that the notes held by DeBlanc had been paid, and afterward re-issued without consideration; and that the indorsements were not genuine, but had been forged. The court ordered a trial by jury; and a few days after, on the eighth of February, the rule was discontinued.

The property was advertised for sale by the sheriff under DeBlanc's writ of seizure and sale, on the nineteenth February; and on that day the Factors' and Traders' Insurance Company brought this suit, and obtained an injunction against further proceedings under the writ.

The petition sets out the judicial proceedings under which the company claims: the opposition of DeBlanc: the giving of the twelve-months bond for the price of the adjudication, and the recording of that bond in the mortgage office: the registry of the *procès verbal* of the sheriff's sale and adjudication in the conveyance office: the continuous possession by the company under the adjudication, and a subsequent judicial partition between the plaintiff and the other co-proprietors: the payment by the plaintiff of a large sum for State and city taxes on the property: that there were taxes unpaid, which plaintiff had been unable to pay, although exercising the greatest diligence; and that this was the cause of plaintiff's failure to obtain a deed from the sheriff in confirmation of the adjudication.

The answer of DeBlanc reiterates the allegation that the \$3000-note had been paid at maturity, and thereby extinguished. It also alleges that plaintiff had not recorded any deed or title to the property: that respondent's mortgage contains the pact *de non alienando*; and that the sale and adjudication were void, inasmuch as respondent's mortgages were and still are first in rank, and exceed the amount of the adjudication. It concludes with a prayer for the dissolution of the injunction with damages; and that the mortgage to secure the \$3000-note be canceled and erased.

The judgment of the district court perpetuated the injunction, reserving to defendant the right, if any he have, to claim, by opposition or otherwise, the proceeds of the sale by the sheriff under the judgment

of the Sixth District Court; and also his right to claim, in a direct action, the nullity of that sale. This is the judgment which the appeal taken by defendant requires us to review.

The mortgage of fifth September, 1865, was given to secure three notes, aggregating \$4000, of which plaintiff held one for \$3000, and defendant held two, one for \$400, the other for \$600. The holders, therefore, were concurrent mortgage creditors, and not third persons with respect to their rights under that mortgage. This mortgage bore upon the entire property of the mortgagor covered by the subsequent mortgages of March and April, 1868, and February, 1869. It was the first mortgage in date and rank; and it had been preserved by the original inscription on the day of its date, fifth September, 1865, and by re-inscription on the twenty-seventh August, 1875. Plaintiff proceeded against the mortgagor by petition and citation, and obtained a judgment contradictorily, and in the ordinary form. In execution of that judgment the sheriff seized and sold the entire mortgaged property, and adjudicated it to the plaintiff. The price of the adjudication, deducting the costs, was not sufficient to pay one third of the debt and interest secured by the first mortgage; and no part of the price could be applied to the subsequent mortgages until the amount due under the first mortgage had been fully paid. It would be a waste of time, therefore, to enter upon any inquiry as to the rights of the parties under the subsequent mortgages until their rights under the first mortgage have been disposed of.

A judgment rendered as this was, between the mortgagor and the holder of one of the mortgage notes, after a serious contest and a protracted litigation, can not be treated as a nullity; nor can it be ignored by any person whomsoever. It might be attacked for nullity; but that must be done in a direct action, and in the court in which it was rendered. *Rhodes vs. Union Bank*, 7 Rob. 63; *David vs. Cabouret*, 1 An. 171. A sale by the sheriff in execution of such a judgment might be attacked for nullity; but that must be done directly, not collaterally, where the nullity is not patent and absolute. *Lawrence vs. Birdsall*, 6 An. 688; *Gillis vs. Carter*, 29 An. 701.

The adjustment and ranking of conflicting mortgage claims fall within the jurisdiction of the court from which the process issued under which the sale of the mortgaged property was made, and would not be cognizable, originally, in any other tribunal. *Adams vs. Daunis*, 29 An. 320; *Buckner vs. Wisdom*, 31 An. 52; *Rev. Stats.* 1942, 2903.

One can not claim, judicially, the proceeds of a judicial sale, and afterward attack that sale for nullity. The demand for the proceeds is the judicial admission of the legality of the sale. *Boubede vs. Aymes*, 29 An. 275; and the declaration which one makes in a judicial proceeding is full proof against him; and it can not be revoked unless it be

Factors' and Traders' Insurance Company vs. DeBlanc et al.

proved to have been made through an error of fact. R. C. C. 2291. Nor can one who has judicially asserted a fact, as the basis of a right touching the subject matter in controversy, be permitted to change his position, and to assert the contrary. Guidry vs. Conner, 4 An. 416 ; Denton vs. Erwin, 5 An. 18 ; Bender vs. Belknap, 23 An. 765 ; Gervin vs. Beaird, 26 An. 630.

If the sale under the judgment of the Sixth District Court was not valid, it must nevertheless have its effect until it has been annulled judicially, in a direct action ; and as the validity of the sale depends upon the validity of the judgment, the attack must be in the Sixth District Court. If the sale was valid, the rights of the plaintiff and defendant are concurrent under the first mortgage ; and are restricted to the *pro rata* distribution of the proceeds.

The defendant by his intervention and third opposition admitted, in a judicial proceeding, a judgment and execution upon that judgment, under which a sale was about to be made, from which proceeds would come into the hands of the sheriff, which proceeds he claimed by preference. As he continued that opposition and claim of the proceeds by preference for more than eight months after the sale was made, he thereby re-affirmed the admission which he had made before the sale ; since, without a legal and valid sale there could have been no proceeds in the hands of the sheriff for distribution. The allegation that the note for \$3000 was paid at maturity, and the mortgage extinguished *pro tanto*, was absolutely inconsistent with his claim of the proceeds, because a sale under an extinguished mortgage would be illegal and tortious ; and as he claimed the proceeds and did not demand the nullity of the sale, he irrevocably elected to treat the sale as legal and valid. His subsequent discontinuance of the opposition in no manner impaired the force and effect of his admission, nor did it enable him to assert the nullity of the sale, or to deal with it as a nullity, in a subsequent proceeding touching the same property.

The difficulty in paying the taxes on the property, and obtaining the sheriff's deed, is probably attributable to the fact that the assessments were upon the entire property held *in indiviso* by the mortgagor and her co-proprietors, and the necessity of ascertaining and apportioning the amount. The *procès verbal* of the sale and adjudication, a good title in itself, was registered in the conveyance office on the tenth February, 1876. This, however, was not important in this case ; because the mortgage first in rank was recorded ; and it protected plaintiff against any junior incumbrance until the sheriff's sale was perfected. We are far from assenting to the proposition that a concurrent mortgage creditor, after a judicial sale of the property, under a judgment *in personam* against the mortgagor, with a recognition of the mortgage rights and

Factors' and Traders' Insurance Company vs. DeBlanc et al.

privileges of the plaintiff, could disregard that sale, and proceed against the mortgage property, whether the title of the adjudicatee had or had not been registered.

We have no doubt but that defendant was concluded, so far at least as the proceeding by executory process is concerned, by his intervention and third opposition ; and we are satisfied that the judgment and the sale are conclusive against all persons whomsoever, until they are annulled, contradictorily with the plaintiff, in an action brought directly for that purpose in the court in which the judgment was rendered.

The judgment appealed from is, therefore, affirmed with costs.

Rehearing refused.

No. 6832.

PAUL TREVIGNE VS. SCHOOL BOARD AND W. O. ROGERS.

An injunction will not issue to restrain the doing of a thing which has already been done, which is an accomplished fact.

On the application for an injunction no mandate can issue to enforce rights claimed by the plaintiff which he does not ask shall be enforced.

A PPEAL from the Sixth District Court, parish of Orleans. *Rightor, J.*

Simeon Belden for plaintiff and appellant.

E. H. Farrar for defendants and appellees.

The opinion of the court was delivered by

DEBLANC, J. Relying on the 14th amendment to the constitution of the United States, which provides that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of said United States," and on articles 135 and 136 of the Constitution of Louisiana, which declare—in substance—that there shall be no separate schools or institutions of learning established by the State or any municipal corporation for exclusively the children of any race, Paul Trevigne, a resident of this city and a citizen of the United States and of this State, seeks to enjoin the Board of School Directors of the parish of Orleans, and William O. Rogers, Superintendent of the public schools of this city, from dividing said schools into schools for exclusively the white children and schools for exclusively the colored children.

In his application, plaintiff expressly acknowledges that the division, which he denounces as thrice unconstitutional, was—at and before the date of his application—an *accomplished fact*, and nevertheless—he merely asks that the Board and the Superintendent *be restrained* from doing what he knew that they had *then already done*, and does not ask

Trevigne vs. School Board and Rogers.

that they be compelled to conform to what he conceives to be the requirements of the Constitution of the Republic and of our State.

The averments of plaintiff's petition do not justify—they contradict, repel and negative its conclusion; this is manifest. Whatever may be his pretension or his right, no court can justly allow that which is not asked, an *enforcing* order in lieu of a *restraining* one. It would be as vain as unreasonable to attempt to *restrain* the execution of an act which—it is judicially admitted—has already been executed: it would be an unprecedented irregularity to issue on these inconsistent pleadings—an *enforcing* mandate, which is not applied for.

By the limited and qualified prayer of his broad petition, plaintiff has put it out of our power to discuss and determine the important question raised by him. The perpetuation of his injunction—this cannot be fairly or successfully disputed—neither would nor could, under the circumstances recited by him, secure and protect the exercise of the privilege which he considers that he is entitled to; and, as held by this Court—in regard to as tardy an injunction as that of plaintiff, one obtained and issued after a seizure had actually been made, and in which the claimant had failed to pray that the sheriff be ordered to return the property he had seized, “such an injunction was,—and, here, would have been in truth a nullity in itself and was properly dissolved on motion.” 4 L. R. 332—18 A. 242—7 R. 412—2 R. 342—9 M. 519—1 Woods, 124—18 N. Y. 155—23d N. Y. 318—6 Metcalf, 425.

There is no error in the judgment appealed from, and that judgment is affirmed with costs.

No. 7231.

JEROME HANLEY, EXECUTOR, vs. MARY A. DRUMM.

A man and a woman, in contemplation of marriage, may enter into a valid marriage contract by which it is stipulated that certain separate property of the man and of the woman shall enter into, and form a part of the community to arise between them as husband and wife. And the property embraced in the contract shall constitute a portion of said community.

A written marriage contract, expressed in unambiguous terms, can not be varied by what was said before, at the time of, or after its completion.

A PPEAL from the Fourth District Court, parish of Orleans. *Houston, J.*

Cotton & Levy for plaintiff and appellant.

Richard Shakelford for defendant and appellee.

The opinion of the court was delivered by

SPENCER, J. The petition alleges that during the sickness of Philip

Hanley vs. Drumm.

Drumm, Sr., the defendant, his widow, took possession of \$3150 in cash, and a mortgage note for \$1000, executed by Edmond J. Bobet, being the proceeds of sales of two pieces of property made by deceased to said Bobet, on January 9, 1875, and converted the same to her own use, and prays judgment against her for the same.

The defendant pleads, first, a general denial. Second, that the mortgage note for \$1000, was given to her by her husband in part payment of her dowry of \$4000, settled upon herself in her marriage contract, which is made part of her answer. Third, that she is entitled to \$1000 for mourning dresses and sustenance for herself and family during the year of mourning, in lieu of interest on her said dowry.

And then assuming the position of plaintiff in reconvention, she pleads said claims in compensation and reconvention, and asks for judgment therefor, less the \$1000 already paid by her husband.

The evidence satisfies us that the defendant did not receive the cash claimed, \$3150, but that said money was all paid out by Philip Drumm, during his life. She did receive the \$1000 mortgage note, as she herself admits.

The question which determines the issues remaining, is, was the sum of \$4000 brought into marriage by the wife, dotal, under the marriage contract which preceded the nuptials?

The marriage contract reads as follows:

"Which said appearers severally declared that whereas they had resolved to join themselves together in the bonds of matrimony, and had in consequence mutually agreed, before the celebration of the marriage, to enter into a formal marriage contract, in order thereby to define and establish the rules and regulations by which their said intended marriage shall be governed.

"Wherefore, and in consideration of the premises, the said parties have mutually agreed, determined, and contracted, and by these presents do mutually agree, determine, and contract as follows, to wit:

First.—"There shall be and exist a community of acquets and gains between the said intended husband and wife, under the modifications and stipulations set forth as follows, to wit:

"The property now belonging to the said intended husband, exclusive of that which belongs to the succession of his late wife, Mistress Margaret Huhner (deceased,) is hereby valued at the sum of twenty thousand dollars (\$20,000.)

"The property now belonging to the said intended wife, all of which has been acquired by her since the death of her said late husband, and by her own industry, and is hereby valued at the sum of four thousand dollars (\$4000.)

"The said property shall be brought into the said intended mar-

riage as common or community property, with the distinct understanding and agreement between the said parties,

1. " That the principal or capital of the proportions of the property so contributed *plus the profits that may be acquired or minus the losses that may be incurred by its use in said community*, as hereafter provided, shall, on the dissolution of the said intended marriage, inure to the use and benefit of the children which each of said parties may have by their former marriage as aforesaid, subject only to the rights secured by law to parents in making their testamentary dispositions, and to the birth of other children during their said intended marriage, and

"Second, that the profits, if any may be acquired by said parties during their said intended marriage, shall inure and belong to them respectively and their heirs, in proportions similar to the amounts as aforesaid by them severally invested in said community. That is to say, the amount of property brought into the said community by the said intended husband, being five fold greater than that brought into the same by the said intended wife, his share in the profits thereof shall be five fold greater than hers, and should the employment of said property or the *labor of said community result in loss*, the amount of such losses shall be *sustained in the same proportions* by the said intended husband and wife respectively.

2. "Neither of the said parties shall be held liable or responsible for the debts of the other contracted prior to said intended marriage.

3. "The property herein before referred to, *as constituting the capital of the limited community hereby established*, shall be under the management and control of the said intended husband."

The defendant contends that under this contract the \$4000 brought by the wife were dotal. The plaintiff asserts that they were put into the community and became a part and parcel of its assets.

We propose to consider, first, whether by the terms of the contract, it was the intention of the parties to make this sum dotal, or to make it a part of the community.

Second, If their intention was to make it community, was the contract so to do lawful.

On the first point there is hardly room for controversy, if we are to attach to words their ordinary and proper signification. The contract declares that there shall be a community. It fixes and declares the amount of property owned by the husband, as also the amount owned by the wife. It declares "*that said property shall be brought into said intended marriage as common or community property*. That the principal or capital of the property so contributed, *plus the profits that may be acquired, or minus the losses that may be incurred by its use in said*

community," shall on the dissolution of the marriage inure to the use, etc., of the children which each of said parties may have by their former marriage, etc. It provides the proportion in which these profits and losses shall be sustained, to wit: in proportion to the respective amounts contributed. It declares that "the property herein before referred to, *as constituting the capital* of the limited community hereby established," shall be under the control of the husband.

It seems that there were losses sustained by this community.

Under the terms of this contract, "the *principal or capital*" contributed by the wife can only be withdrawn, *minus* her proportionate share of "the losses."

We hold, therefore, that it was the intention of the contracting parties to put their money and effects as estimated into the contemplated conjugal partnership as capital.

2. Was such a contract lawful and within their power?

C. C., art. 2305, provides: "In relation to property, the law only regulates the conjugal association in default of particular agreements, which the parties are at liberty to stipulate as they please, provided they be not contrary to good morals, and under the modifications hereafter prescribed." The Code then goes on to enumerate certain agreements which they can not make, such as altering the legal order of descent, derogating from the marital power, etc.

Art. 2309 declares that matrimonial agreements may be altered by consent *before*, but *not after*, the marriage.

Art. 2338. "Whatever in the marriage contract is declared to belong to the wife, or to be given to her on account of the marriage, etc., is part of the dowry, *unless there be a contrary stipulation.*"

We have seen that there was in this case "a contrary stipulation." The only question is, as to the legality of that contrary stipulation.

The defendant asserts that said stipulation is null and void:

1. Because it violates art. 2412, whereby "the wife, whether separate in property by contract or by judgment or not separated, can not bind herself for her husband, nor conjointly with him, for debts contracted by him before or during the marriage, etc." It was by reason of this article that the district judge gave judgment for defendant. But it seems manifest to us that this article refers and can only refer to obligations assumed by the wife *after* the marriage. The whole theory of that article rests upon the presumed existence and exertion of the marital authority. Such an application of the article would nullify the greater part of the provisions of the Code under the head of marriage contracts. *Prior to the marriage*, the law treats the intended wife as *sui juris*, as a free agent; but *after* it, it treats her as subject to the power and authority of the husband, and as no longer able to protect

herself. Hence it interposes to shield her from impositions and wrong.

2. It is contended in the next place that the said stipulation violates article 1752, R. C. C., which forbids a man or woman contracting a second marriage, having children by a previous one, from giving to the other more than the least child's portion in usufruct, etc. We do not see how it can be said that the wife gave any thing to her husband in this case. So far from giving, she carefully provided for the return of her contribution to the partnership, plus all profits or minus all losses resulting from the venture.

3. It is further contended that the stipulation is in contravention of public policy. The case of *Belongnet vs. Lanata*, 13 A. 15, is cited as authority that the law prohibiting the alienation of dotal property is a law of public order. That is doubtless true; but before it can be invoked it must appear that the property is dotal. That is the very question in dispute, and the very argument begs the question. If the property is not dotal, the authority is inapplicable. If it is dotal, we fully agree to the proposition. But we have seen that by the very words of the contract the property was put into the community. If that stipulation be lawful, then the property is not dotal, but community. We have seen that under art. 2305 C. C. the parties may, by marriage contract, stipulate "as they please" relative to their property rights, provided it be not contrary to good morals, or prohibited by the Code. We see no reason to say that an ante-nuptial agreement between parties contemplating marriage, whereby they put their respective means into a common fund, to be employed for their common benefit, should be immoral or illegal. Why should the wife not be permitted to contribute to this fund, when she is to share its benefits? Why should she be compelled to take all the chances of gain, and none of loss? Why should she not be permitted to participate, if she so elects, by ante-nuptial agreement, in the risks which life imposes upon her husband and his property? What is there wrong or immoral in a woman agreeing to share the fate of her intended husband? We agree with plaintiff's counsel that the law favors, and ought to favor the community. In the absence of proof to the contrary, it presumes that all property existing at the dissolution of the marriage belongs to it.

4. But it is said that art. 2371 prescribes and specifies of what the community is composed. That it is restrictive and mandatory. That article regulates and defines the "legal community" not the conventional community. It provides for the case where there is no agreement of parties, when they have been silent. It has no reference to the cases foreseen by articles 2305 and 2393, where the parties have modified by agreement the extent and character of the conjugal partnership.

5. But it is said the parties by their subsequent acts and conduct

have shown that it was not their intention to make this \$4000 community property. The answer to this is, that marriage contracts can not be changed or altered after marriage, even by formal agreement, much less by indirection, by acts and declarations. Their contract was reduced to writing. It can not be varied by what was said before, at the time of, or after its confection. C. C. (2276) 2256.

We see no reason, and know no law, interdicting the parties from stipulating that the sums brought in marriage should enter into and become part and parcel of the community. On the contrary, the adjudicated cases are clearly in favor of the existence of the right. In the case of Fabre vs. Spacks, 12 R. 32, the first clause of the marriage contract stipulated that "there shall be a community between them, which shall comprehend all their estate, real and personal, present and to come." The second established the amount brought in by the husband. The third specified the property owned by the wife at the date of the marriage.

The fifth clause was in these words: "In case of the death of either the husband or wife, without children, etc., the amount of the property brought into this community by the one that shall die first, with the profits arising from the community, shall revert to the survivor, etc." Under this contract this court held that by the first clause all the wife's property was constituted community, and that by the fifth clause the husband took it all to the exclusion of the wife's collateral heirs.

The doctrine of this case was affirmed in "Succession of Mossy" 4 A. 338, where the court expressly recognize the right of the wife by marriage contract to put her property into the community.

We therefore hold that the \$4000 brought into marriage by Mrs. Drumm fell into and became part of the community; that she has no dotal rights under said contract; that the pretended *dation en paiement* of the \$1000-mortgage note is null and void, and that the executor of Philip Drumm is entitled to recover the same or its amount.

It is therefore ordered and decreed that the judgment appealed from be avoided and reversed, and it is now ordered and decreed that the plaintiff as executor do recover of the defendant the mortgage note described in his petition, to wit: the note of Ed. J. Bobet, dated January 9, 1875, payable one year thereafter, for one thousand dollars, bearing eight per cent interest from its date, and that said defendant deliver the same to said plaintiff. That in default of such delivery, within ten days from notice of this judgment, said plaintiff recover of the said defendant, in money, the amount of said note, to wit, one thousand dollars, with eight per cent interest from January 9, 1875, till paid. It is further ordered that the defendant pay costs of both courts.

Rehearing refused.

No. 7193.

ANNAIS BERENS VS. EXECUTORS OF FRANÇOIS BOUTTÉ.

An injunction without bond and security will not issue to restrain an order of seizure and sale except on a sworn allegation of one or more of the specific causes enumerated in article 739 of the Code of Practice. If any other cause is alleged by the plaintiff in injunction, in addition to any of those enumerated in article 739, he must give bond and security.

The opposition of a mortgage creditor to the account of an executor on the ground that he was not recognized as a mortgage creditor on the account, is not such a proceeding *via ordinaria* as will prevent the creditor from afterwards proceeding *via executiva* against the property subject to his mortgage.

A formal petition by a mortgage creditor of a succession asking to be recognized as creditor, and demanding that the executor give security for his claim, is such a judicial demand as will interrupt prescription.

An executor who classifies a claim against the succession as one of its debts, and prays for the sale of succession property to pay the claim, thereby acknowledges the debt and interrupts its prescription.

Courts of ordinary jurisdiction are empowered to issue writs of seizure and sale against succession property.

The mere fact that a mortgage note is prescribed on the face of it will not prevent the issuance of a writ of seizure and sale to enforce its payment.

Damages will not be allowed against an executor on account of a wrongful injunction when it appears that he was disinterested, and acted in good faith for the interest of the succession.

A PPEAL from the Fourth District Court, parish of Orleans. *Houston, J.*

Ed. Bermudez and J. Ad. Rozier for plaintiff and appellee.

Ellis & Ellis and John McEnery for defendants and appellants.

The opinion of the court was delivered by

MANNING, C. J. The plaintiff, holding six promissory notes secured by mortgage, sued out executory process from the Fourth district court of Orleans against the mortgaged property, which belonged to the succession of François Philippe Boutté. The executors of that succession obtained an injunction, prohibiting the sale under that process upon three grounds ;

1. That the plaintiff's action *via executiva* is extinct, because she had already proceeded *via ordinaria*, which latter is a peremptory bar to the executory process.

2. That the proceeding *via ordinaria* is still pending, and the plea of *lis pendens* is interposed.

3. That the debt is prescribed.

The plaintiff moved to dismiss the injunction for the reason that the executors had failed to give bond and security upon obtaining the writ. The order granting that writ had dispensed them from giving any security under authority, it is said, of Code of Practice, arts. 739-40. The plaintiff insists that the authority, thus given to the judge to require no

surety, must be confined to the eight specific cases there enumerated, and that debtors cannot be permitted to arrest a sale without security in any others, nor join other causes to those there enumerated in an injunction without surety.

We are earnestly pressed to pass upon the question thus presented to us, and we do not see how or why it should be avoided.

Ordinarily a party arresting a sale through an injunction must provide a means of indemnification to the creditor, whose process is stayed. There are eight causes, by alleging any one of which under oath, a debtor will be dispensed with giving surety for any damages his writ may occasion, but to guard against the injury which a prolonged suspension of the enjoined process might occasion, the plaintiff in that process may require the judge to pronounce summarily on the merits of the injunction. Code Prac. art. 740. In singling out these eight causes from all others, and imparting to them a special quality, the Code must have intended that it should be exclusively their own, and it follows as a logical sequence that other causes cannot be associated with them, or one of them, and thus under cover of their or its protection obtain a boon or privilege which was refused to these others. Otherwise a debtor, whose reliance for a successful resistance to process rests upon grounds that require a surety, may by merely conjoining with them one of the reasons, for which surety is dispensed, obtain the advantages accorded alone to the latter. And this would be a palpable evasion of the law. If the debtor seeks to arrest the sale of his property for one or more of the specified reasons, upon alleging which under oath, the judge will not require surety, he must confine himself to those reasons if he wishes to avail himself of that privilege. If he prefers to strengthen his claim to relief by adding other reasons, there can be no objection to this cumulation of grounds for injunction, but he must give bond and surety as required under other provisions of the law regulating the issuing of those writs.

There were then good grounds for the motion to dissolve, or for restricting the party injoining to the introduction of evidence in support of the plea of prescription alone. *Williamson v. Richardson*, 30 Annual, 1163. The case is however before us on the merits, and all parties are interested in having a final decision. *Interest reipublicæ ut sit finis litium*.

It is undoubtedly true that if one, having a right to executory process, elects to pursue *via ordinaria*, he cannot abandon that and afterwards revert to the *via executiva*. But what is the alleged ordinary process in this case? The executors had filed an account, and had abstained from placing thereon the proceeds of the sale of this property which had been effected under a proceeding, the validity of which was

then in contestation, and they had also abstained from placing Mrs. Berens on their tableau of distribution as a mortgage creditor. She opposed the homologation of this account and tableau, and that is the alleged ordinary action. The sale which had been effected was annulled. *Boutté v. Boutté*, 30 Annual, 181. The proceedings in the probate court upon the account and tableau, so far as concerned the distribution of the proceeds of that sale, necessarily were at an end upon the rendition of the decree annulling the sale from which the proceeds sprang. There was therefore no *lis pendens*, and there had not been any ordinary action upon the mortgage notes. The opposition of the mortgage creditor had for its object to prevent the homologation of a tableau which failed to recognize the opponent's mortgage rights, and did not prevent the assertion of those rights in an action, either in the ordinary or executive form.

Let us endeavour to make this clearer. An account of an executor is merely a statement of the moneys he has received as assets of a succession on the one hand, and their disbursement by actual payments on the other. An opposition to such account may claim that all the assets which have been received are not placed upon it, or that some of the payments were illegal and unauthorized, and such like objections. A tableau of distribution is a statement of the funds received, or to be received, and their intended payment, where upon the one hand there appear the funds to be distributed, and upon the other is the proposed distribution of them. An opposition to this may, like an opposition to an account, claim that there are more funds, or ought to be more, in hand than are acknowledged, and besides that the proposed distribution of them is against law, violative of the ranks of different debts, etc. What is there in the nature of such oppositions that precludes the opponent from asserting her claims against the succession by a regular suit?

The plea of prescription alone remains. It will be understood from what we have already said that the motion to dissolve should have been sustained, or the plaintiff in injunction should have been confined to the consideration and support of that plea alone, since the injunction without bond could have been based only upon it. The plea is confessedly inapplicable to the larger part of the debt, and can affect only the note for \$7,636.00, maturing August 14, 1870. The time of payment was then extended another year, and subsequently by seven several extensions to Dec. 18, 1874. All of these extensions are written upon the back of the note, and are signed by Berens but not by Boutté, and they all state that the interest was paid in advance at each extension. Their admissibility to bind the deceased Boutté is denied under the act of 1858. Passing them over as evoking an unnecessary discussion in the presence of other testimony touching the interruption of prescription, we find the

Berens vs. Executors of Boutte.

plaintiff presenting her petition to the Court July 24, 1875, representing herself as a creditor for this whole mortgage debt of over \$23,000, which sum includes the note for \$7,636, and praying the court to order the executors to furnish security for her claim, and they did execute a bond for \$30,000. Four months before this, viz March 17, 1875, the executors presented a petition to the court, setting forth a list of the debts of the succession, upon which list the whole of this mortgage debt appeared as due to plaintiff, and prayed an order of sale to pay the debts thus acknowledged. Here were two interruptions of prescription within five years from the maturity of the note. It cannot be contended that Mrs. Berens was bound, if she would avoid prescription, to bring suit upon her notes and demand judgment thereon. The law not only fails to require parties having claims against successions to bring suit, but mulcts them in costs if they do bring suit where the representative of the succession has acknowledged the claim. Code Prac. art. 984. Suc. Romero, 29 Annual, 493. The executors acknowledged the mortgage notes by a proceeding in court, wherein they included them in a classification of the succession debts, and asked leave of the court to alienate its property to pay them. The notes were not extinguished. Prescription was not acquired. Throwing out of the case all the payments of interest, and all the prolongations of maturity, this judicial proceeding by the executors was taken within five years from the maturity of this note on its face. And they had already given security, at the instance of the plaintiff and upon her judicial demand, for a sum based upon the whole amount of her mortgage debt.

The French writers take this view of the demand which interrupts prescription. Quelle différence y-a-t-il en effet entre une demande formée en justice par citation lorsque les parties n'ont pas encore ouvert la lice judiciaire, et une demande formée incidemment ou réconventionnellement lorsque les parties sont en présence du juge? Les expressions de notre article, *citation en justice*, doivent donc s'entendre d'une manière large; il eut été plus exact de dire, *une demande en justice*. Trop-long Prescription no. 562. Les expressions, *citation en justice*, doivent s'entendre d'une manière large. Elles s'appliquent à toute demande en justice. Merlin's Repertoire, Presc. nos. 401—5.

It is also claimed on the part of the executors that the order of seizure and sale and all subsequent proceedings based upon it, are stricken with absolute nullity for want of jurisdiction in the Fourth court to issue such order against the property of a succession, and we are referred to two decisions as directly in point. Poutz vs. Bisles, 15 Annual, 636 and Wisdom v. Buckner, recently decided and not yet final. The first case ruled that when an order of sale of succession property for the payment of debts had been made by the Second Court of Or-

 Berens vs. Executors of Boutte.

leans, a subsequent order of seizure and sale granted by one of the other courts against the same property was in conflict with the jurisdiction already assumed by the Second court, and *therefore* irregular. The second case decided that the Second court could issue an order of seizure and sale against succession property, and reviewed the previous conflicting decisions upon that power, but expressly and in unmistakable language announced that, although there had been contrariety of opinion touching the power of the Second court in that particular, it had never been doubted since *Boguille v. Faille*, 1 Annual, 204 that the courts of ordinary jurisdiction could issue executory process against the property of successions.

Lastly, the executors urge that the notes being prescribed on their face, no order of seizure and sale could issue without the production of authentic evidence before the judge of the interruption of prescription. We have disposed of that objection heretofore. *Williamson v. Richardson*, 30 Annual, 1163.

The lower court dissolved the injunction with costs. We are asked to allow damages. The plaintiff's notes bear interest, and five per centum upon their amount was properly allowed as attorney's fees, stipulated in the mortgage. The injunction was provoked by representations of a succession. It is not alleged, nor is it apparent, that they have any personal interest to subserve by this action. We must presume and believe that they were endeavouring merely to protect the interests of the succession, and we will not therefore inflict damages.

Judgment affirmed.

Rehearing refused.

 No. 7276.

STATE EX REL. W. W. FARMER vs. JUDGE PARISH COURT OF OUACHITA.

The service on an administrator of the order of the court to file an account of his administration is a sufficient notice to him. No citation need be served on him, nor is he entitled to the delay of ten days for responding to the order.

A party may be imprisoned for a contempt of court without the previous finding of an indictment, or laying of an information against him for the offense.

An appeal does not lie from an order of the probate court imprisoning an administrator for contempt of court in refusing to obey a peremptory mandate to file an account within a certain delay.

APPPLICATION for a mandamus.

Cobb & Gunby for relator.

A. L. Slack, parish judge, in person, and *R. W. & R. Richardson* and *Richardson & McEnery* for respondent.

The opinion of the court was delivered by

MANNING, C. J. This is a proceeding by mandamus to compel the

parish judge of Ouachita to grant an appeal from his order imprisoning the relator for disobedience of a mandate to file an account of his administration of the succession of C. H. Morrison.

Creditors of the succession had instituted proceedings against the relator, calling for an account of his gestion, and on May 27, 1878, a formal judgment was entered ordering the administrator to file such account within ten days. In the following month, the administrator applied for an extension of the time, and it was granted. On July 1st. another application was made for a further extension, and it was also granted—the 19th. of same month being fixed as the limit. On Oct. 7th. following, no account having been filed, Wallace & Co, and other creditors of the succession, took a rule upon the administrator to shew cause why he should not be imprisoned for disobedience of the order of the court, and until he does obey that order, which was duly served. On the following day a peremptory order was made that the administrator should file his account on or before the 14th. of same month under penalty of imprisonment. An exception was then filed to the proceedings on three grounds;—1. That no mandate had issued to the administrator, and therefore the motion to imprison was premature; 2. That no citation or copy of petition had been served on him, and the ten days delay had not been accorded him for answering; 3. That no indictment or information had been found or filed against him, and that he cannot be arrested and imprisoned without such indictment or information, and that any proceeding to deprive him of his liberty without such criminal prosecution is unconstitutional, and all laws authorizing it are void.

The second and third grounds of exception are untenable. The service of the order of the Court was the proper manner of notice under the rule, and the administrator was not entitled to the delay given for answering an ordinary suit. It cannot be seriously contended that a court cannot imprison for contempt unless an indictment for the offence has been found, or an information laid. That would be equivalent to saying that a court cannot punish a contempt by imprisonment, since the act committed is in most cases not an indictable offence. The lower Court evidently considered the first ground more serious, as it proceeded immediately to obviate the objection.

On Oct. 9th., after the exception was filed, a peremptory mandate issued in the name of the State, commanding the administrator to file his account on or before Oct. 14th. under penalty of imprisonment. The account was not filed, but on that day the administrator answered. He alleges that his delay has been caused by circumstances over which he had no control—that during the month of July he was engaged in attendance on this Court at Monroe, he being a practising lawyer—that shortly afterwards he was absent at a political convention at Baton

State ex rel. Farmer vs. Judge Parish Court of Ouachita.

Rouge, and before he could get home, the yellow fever had appeared, and he was quarantined on his return—that after he was permitted to enter the town of Monroe where he lives, he was prostrated by a dangerous illness, and has not yet recovered from its effects—that no person but himself can file an account, and he has been physically unable to do it—that he has either consumption or some kindred disease, and is undergoing medical treatment, and that confinement in jail would develop the disease, and he disclaims any desire to evade the provisions of the law prescribing his duties.

Upon the rule and answer trial was had, and he was given until Oct. 28th. to comply with the mandate. On that day nothing had been done, and he then presented a petition to the court, averring that his health had become worse; and that he had been working on the account but had not been able to finish it—that he has no intention of leaving the parish until the account is completed and filed, and that he intends to work upon it without turning aside to any other matter, and prays that the time be again extended.

The Court refused to grant any further delay, but did in fact grant a short time. On Oct. 31st. another peremptory mandate issued to the administrator to file his account on or before Nov. 4, or failing to obey, that he should be imprisoned until he does file it. It was not obeyed, and on Nov. 9th. the judge ordered that the administrator be imprisoned until he does obey it.

An appeal was prayed from this order, which being refused, application was made to us for a mandamus. It was issued in the alternative form, and the judge having answered, we have now to determine whether it shall be made peremptory.

The sole question for us to answer is, whether an appeal lies from such an order. The relator alleges that his personal liberty is worth more than five hundred dollars to him, and so might any one allege who had committed any sort of contempt, and if such allegation could give us jurisdiction, no court could exercise any disciplinary authority, since the infliction of punishment would be instantly arrested by a suspensive appeal. Neither the matters involved in the settlement of the succession, which amounts to several thousand dollars, nor the defences or excuses made by the administrator for not filing his account, are to be considered now. If the parish judge had authority to punish for contempt, we cannot interfere with, or impede the exercise of that authority. The Code of Practice declares that all judges possess the powers necessary for the exercise of their respective jurisdictions, though the same be not expressly given by law, (art. 130) and even without that enactment, it is a power inherent in a court to repress disorder, and punish infractions of its discipline, for laws, says Blackstone, with-

State ex rel. Farmer vs. Judge Parish Court of Ouachita.

out a competent authority to secure their administration from disobedience and contempt, would be vain and nugatory, and therefore the power to punish contempts, by an immediate attachment of the offender, results from the first principles of judicial establishments. 4 Comm. 286. In the next article of the Code of Practice, express power is given to the judges to punish all contempts of their authority, and under the heading of accounts to be rendered by administrators, it prescribes imprisonment as the means to be employed to compel their rendition. If at the expiration of the time given by the judge, an administrator refuses or neglects to render his account, the judge shall issue a mandate directing him to comply with the provisions of the law, and if within the time allowed to obey this mandate, the administrator persists in refusing to render an account, without tendering a good reason for the delay, the judge shall order him to be arrested and imprisoned until he renders the account. art. 1011.

The relator bases his right of appeal in part upon the allegation that the order is a final judgment, and its enforcement would work irreparable injury to him. Perpetual imprisonment would be an irreparable injury, but the duration of the imprisonment depends upon the administrator's own action. When he obeys the order, his imprisonment terminates. *Quoad* the succession, the order is manifestly interlocutory, It is made in the course of legal proceedings for the purpose of pushing them on to a finality. *Quoad* the relator it is not final. By obeying it, he at once performs an important act in his gestion, and lays the basis for that final decree which shall approve his account, or sustain objections to it.

We do not omit noticing that the order to imprison has not been literally enforced. The relator is in jail only constructively. He has been on parole, as is said in the judge's answer, the Sheriff being directed to hold him in custody, and to permit him to remain at his residence. This was humane, and under the circumstances of this case, very proper. The relator's health, and his professional standing, justify this relaxation of rigour, and as two months have now elapsed since the order was made, we do not doubt that he has availed himself of that time to finish the account which the creditors had a right to require, and which the judge several times granted time for its preparation.

We cannot abridge the power of inferior courts to compel obedience to their lawful mandates, and if imprisonment of an administrator be a harsh mode of compelling him to do an act of administration, or if it be a senseless mode, since he would be less able to prepare an account in jail than out of it, the abrogation of that mode of compulsion must be left with the legislature. So long as it is permitted by law, courts may be compelled by creditors to apply it.

The peremptory mandamus is refused at the costs of the relator.

Matchler et al. vs. the Bank of Lafayette.

No. 5557.

ROSALIE MATCHLER ET AL. VS. THE BANK OF LAFAYETTE.

The surviving wife, whose husband died previous to the twenty-fifth of March, 1844, has no right of usufruct in the half of the community property belonging to the children of herself and her deceased husband.

A PPEAL from the Sixth District Court, parish of Orleans. *Saucier, J.*

Louque & Fernandez for plaintiffs and appellees.

Breaux, Fenner & Hall for defendant and appellant.

The opinion of the court was delivered by

SPENCER, J. This is an action of partition. The only question submitted and necessary to decide is, whether the surviving widow has the usufruct of her children's half of community property where the deceased husband died in 1841? The law conferring this right of usufruct on the surviving husband or wife did not exist in 1841, and was only enacted 25th March, 1844. See act No. 152 of 1844. On the death of the husband, therefore, in 1841, his half of the community vested, in full ownership, in his children, and the act of 1844 could not divest them of that right. Laws prescribe only for the future. C. C. The widow had no usufruct in this case.

We see no error in the judgment, and it is affirmed.

No. 7282.

STATE EX REL. WIDOW MERZ ET AL. VS. JUDGE OF THE THIRD DISTRICT COURT.

Where an injunction, restraining the execution of an order of seizure and sale on the ground that the debt was not exigible, is dissolved, and the plaintiff in injunction takes a suspensive appeal from the judgment of dissolution, the lower court will be prohibited from ordering the execution of the seizure and sale (because of the subsequent maturing of the debt) until this court has passed on the question of the prematurity of the suit involved in the appeal.

A PPLICATION for a writ of prohibition.

R. Stewart Dennee and *R. L. Belden* for relators.

Chas. E. Schmidt for respondent.

The opinion of the court was delivered by

SPENCER, J. Relators obtained an injunction to stay execution of a writ of seizure and sale obtained against them in the suit of "*Saloy vs. Widow Merz et al.*" The sole ground upon which that injunction was asked was prematurity of demand—that the said Saloy, upon the condition of their paying the interest, had agreed to extend the time of pay-

State ex rel. Merz et al. vs. Judge of the Third District Court.

ment of the mortgage notes one year, *i. e.* from the 23d Nov., 1877, to 23d Nov., 1878. They alleged that they had complied with the condition and were entitled to the extension. This order of seizure was granted to Saloy on 20th May, 1878, and enjoined on same day by relators. It was tried, and the injunction dissolved, from which decree relators took a suspensive appeal on giving bond for costs. After this appeal had been perfected, to wit: on 30th Nov., 1878, Saloy's counsel suggesting to the court that the time of extension claimed by relators for payment of said note, and for which said injunction was granted, had expired and the injunction thereby become inoperative, moved the court for an order directing the sheriff to proceed with the execution. This order was granted, except for the sum of \$874, the amount which relators claimed to have paid as interest on the mortgage note. The matter before us is an application for prohibition against this order, on the ground that by the appeal the Third District Court was divested of all jurisdiction, and could grant no orders in the case. The reply of the judge may be summarized thus:

"What was the thing demanded in the injunction suit? It was that Saloy be restrained and enjoined from executing his mortgage until 23d Nov., 1878. The court ordered that he be *so enjoined*. That is the order that was kept in force by the appeal. On the 23d Nov., 1878, the injunction expired by limitation. Thereafter there was no injunction existing, and therefore none to be suspended by the appeal. The court in ordering the sheriff to proceed did not violate the injunction, or invade the jurisdiction of this court—for there was then no such order, and therefore no jurisdiction thereof in this court."

We confess that there is much force and plausibility in these propositions of our brother of the district court. But there is a view of this case, not presented in argument, which we think forces us to differ from the conclusions of the judge *a quo*. The real defense made by relators was the prematurity of plaintiff's demand; that plaintiff had obtained an order of seizure and sale on a debt *not due*. That was the allegation upon which the injunction was asked. Now the question thus raised, to wit: Whether plaintiff made his demand before his debt was due, must be determined and decided upon the state of facts existing at the time the suit was brought. If the debt was not due, plaintiff's proceeding was wrongful, and properly enjoined. This wrong is not righted, this defense is not defeated, by the fact that before the issue is decided the debt becomes due. The penalty for bringing an action prematurely is its dismissal, unless defendant waives the exception. The exception of prematurity is not defeated by the subsequent maturity of the cause of action. If this were so it would often enable a plaintiff to avoid the effects of his own wrong by the commission of another, by postponing a

State ex rel. Merz et al. vs. Judge of the Third District Court.

decision until his debt had matured. So we hold that the question of prematurity must be tested by the facts existing at the date the suit is brought, and that the penalty is dismissal of the suit if found premature. Under this view, it is manifest that the expiration, pending the suit, of the time of the alleged extension, does not relieve the plaintiff from the consequences of his wrongful act; that the relators have the right to have this court review the judgment of the district court on the question of prematurity, and if the exception is found to be well taken, they have the right to demand the maintenance of their injunction and the setting aside of plaintiff's order of seizure. The district judge, we think, invaded the jurisdiction of this court in rendering said order.

It is therefore ordered and decreed that the writ of prohibition herein issued be made peremptory at costs of respondent.

No. 7301.

THE STATE EX REL. M. H. REDON VS. J. H. SPEARING ET AL.

The Supreme Court is without jurisdiction to issue a writ of prohibition to a district judge, to whom a petition has been addressed, praying that testimony be taken in the case of a contested election of a member of the Legislature, forbidding him to grant an order for the production of ballot boxes and counting of the ballots. In such cases the lower judge acts, not in a judicial capacity, but merely as a commissioner.

APPPLICATION for a writ of prohibition.

B. F. Jonas for the relator.

F. C. Zacharie and *C. L. Walker* for respondents.

The opinion of the court was delivered by

MANNING, C. J. The relator alleges that he was elected to the lower house of the legislature last November, and that the respondent Spearing intends to contest his election, and has served due notice thereof, and has also presented a petition to the judge of the sixth district court of this city, praying that the testimony of witnesses be taken in support of his (Spearing's) claim. He farther alleges that the judge has issued an order to the clerk of the Superior Criminal Court to produce the ballot boxes containing the votes cast at the election at five several polls, and has also ordered those boxes to be opened, and the ballots therein to be counted. The clerk of the Criminal Court is the legal custodian of the ballot boxes. The relator charges that the judge is exceeding his jurisdiction in granting this order for the production of the ballot boxes, and for counting the ballots, and he therefore prays a writ of prohibition.

Upon a rule to shew cause why the writ should not issue, which we granted, both respondents deny that this court has jurisdiction over the subject matter.

The application to the judge to take testimony is made under this provision for contested elections of Representatives;—any judge of a court of record, or two justices of the peace shall issue subpoenas for witnesses, and shall have power to compel their attendance, and the depositions taken before them shall be transmitted to the Secretary of State, who shall lodge them within three days after the succeeding session with the Clerk of the House of Representatives. Rev. Stats. sec. 1432.

It would seem that a judge, acting under this law, is not sitting in his judicial capacity, but merely as a commissioner before whom *witnesses* are to be brought, and that it is only the *depositions* of witnesses that he is empowered to take, for the law is special, and no power should be exercised under it that is not specially conferred. Whether the production of a ballot box, and the breaking of its seals, and the counting of the votes therein deposited, can be legitimately included under an authorization to summon witnesses and take their depositions, is a matter for the judge, who is acting under this special law to consider. We can only observe that more than usual caution and hesitancy should be observed in determining to do an act which does not appear to have been expressly authorized. The act of Congress relative to the same subject gives a more enlarged authority than our statute in this, that it specially provides for the production of papers. U. S. Rev. Stats. sec. 123.

The question of jurisdiction however is the vital one for our consideration. The House of Representatives is the judge of the qualifications, election, and returns of its members, but a contested election shall be determined in such manner as may be prescribed by law. Constitution, art. 34. The law has not provided any special manner in which the contested election of a representative shall be determined, and therefore the House is the exclusive judge of such election, and the returns thereof. To facilitate it in the performance of this function, permission is accorded to all parties claiming the seat to take the depositions of witnesses, which are required to be transmitted to the Secretary of State, who must lodge them with the clerk of the House.

There is no law providing for a judicial scrutiny of the votes cast for Representatives. The judge of the Sixth Court is not hearing and determining a cause, but merely sitting as commissioner to take depositions. The writ of prohibition only issues to courts of inferior judges which exceed the bounds of their jurisdiction. Code Prac. art. 845. It is an order rendered by an appellate court of competent jurisdiction,

State ex rel. Redon vs. Spearing et al.

and directed to the judge and to the party suing in a suit before an inferior court. Ibid. art. 846.

There is no suit here, and no judge acting in his judicial capacity, and therefore there is nothing upon which the writ can operate.

It may be that the commissioner is about to exercise a doubtful, or undelegated power. It may be that the exercise of such power is wholly unnecessary, since ultimately the House of Representatives can and will do (if it be necessary) what the commissioner proposes to do, viz break the seals of the ballot boxes, and count the votes, and therefore the commissioner will have done a supererogatory act, but we are without jurisdiction to issue a writ to him which shall prohibit him from doing that act. And since the determination of the election contest of a Representative is a matter wholly delegated to the legislative department of the government—of co-ordinate and equal dignity and authority with the other departments—it is becoming in the judiciary to abstain from even an appearance of trenching upon a domain exclusively appropriated to others.

The writ is refused at the cost of the relator.

No. 7198.

PHILIP DRUMM, EXECUTOR, ET AL. VS. LOUISA KLEINMAN.

When it appears from the evidence that property bought during marriage by the wife, and in her name, with the authority of her husband, who was a party to the deed of sale, was paid for out of money that belonged to the wife, neither the executor of the husband, nor any devisee of the husband, who is not his creditor, or forced heir, can contest the widow's title to the property, and set up that it is community.

Property bought by a wife, in her name, after the institution of her suit for a divorce and separation of property, which were subsequently decreed in her favor, is presumed to be her separate property.

A PPEAL from the Parish Court of Jefferson. *Hyman, J.*

Richard Shackelford for plaintiffs and appellees.

James Brewer and *W. J. McCune* for defendant and appellant.

The opinion of the court was delivered by

MANNING, C. J. This is an action of partition. Louisa Kleinman, the defendant, had for her first husband Charles Gelbke, and for her second, Caspar Weisz. This second marriage took place in June 1854. Two improved lots in Gretna were bought by Mrs. Weisz in October 1856, the price being seven hundred dollars, and the title thereto being

taken in her name, and reciting that the money was paid out of her paraphernal and separate fund. Her husband joined in the act, authorizing her to buy and sign.

In April 1877 she sued her husband for a divorce, alleging cruel treatment, and for a settlement of the community, alleging that the two lots bought as above stated were her paraphernal property, and prayed that the house upon them be assigned as her residence pending the suit. She obtained her decree of divorce Dec. 8, 1877. On the 15th. of that month she bought other lots and paid four hundred and seventy-five dollars for them.

Caspar Weisz died in 1878, having made a last will in March of that year, of which he appointed Philip Drumm executor, and by which he devised and bequeathed to his nephew John Kretz and his stepson Louis Gelbke all of his property. There were no children of his marriage with defendant. There were four children of her marriage with Gelbke, and one of them is one of the devisees under the will. The plaintiffs in this suit are the son of the defendant, and Kretz, who claim as universal legatees and instituted heirs, and Drumm the executor. Their claim is that this property, bought by the defendant as already detailed, is a part of the community, and they pray its partition. The defendant denies that this property is community—claims it as paraphernal—and alleges that her separate funds, derived from her occupation of public merchant, were used by Caspar Weisz for the purchase of whatever property he had, and prays a sale of all the property inventoried, except that claimed as paraphernal, to re-imburse her.

During the first marriage with Gelbke, the defendant kept a grog-shop, her husband pursuing his occupation of barber. Both of them appear to have been industrious and thrifty. They maintained themselves and their family, which rapidly increased to four children, and at Gelbke's death, there was some property. The widow bemoaned her loss, wringing her hands, and "crying and wondering what she should do," and the plaintiffs interpret that wail of distress as an admission that she had nothing to live on or to support her children. Far from it. It was but the natural and spontaneous expression of her sense of present loneliness in the first moments of widowhood. She recovered from it, and married again in less than a year. Shortly after this second marriage the business which she had been carrying on was enlarged. Weisz, the second husband, was the driver of a milk cart at twenty dollars a month for wages. It is said he had saved six hundred dollars, and on his marriage with the defendant, he quitted his former occupation, and came to live with her. The plaintiffs' theory is that his six hundred dollars was the foundation of all future acquisitions, and that it was his judgment and attention to business that opened a wider field,

wherein was afterwards reaped the fruits that form the subject of contestation now.

Of course that, or the opposite conclusion, is to be reached only by a careful survey of all the evidence. We shall not recapitulate it. There are salient facts developed in it that satisfy us that the statement made in the deed of 1856, that the property then bought was paid for by the wife out of her separate estate, is the truth.

All the purchases for her grocery were made by her. She was the active manager of her business, and gave personal attention to its conduct. It increased and became profitable. Those who sold to her received payment from her, and knew only her in the business. If Caspar Weisz had been the real owner of the grocery, or the furnisher of its stock, and the manager of its affairs, we should hear more of him from those who dealt with the store—from those who sold to the grocery as well as those who bought from it. She had money. Her savings increased rapidly. There is nothing improbable in her having seven hundred dollars, the profits of her business, with which to buy property. She bought another piece of property during the year the divorce suit was pending, and a few days after its termination, and paid for it. The husband signed the deed of 1856 conveying the property to her, in which was recited the fact that the money was hers.

Can the present plaintiffs gainsay this declaration in the deed, to which the husband had put his hand? If they were creditors or forced heirs of the testator, there is no doubt they could. Were it otherwise, collusive declarations made by parties to an authentic act would conclude those whose interests are affected by them. But these plaintiffs are neither creditors nor forced heirs. One is the mere executor of the will with no substantial interest in the question. The other two are simply subjects of gratuitous bounty, who have no claim to any of the testator's property except that derived from the will. They stand in his shoes. They are bound by his acts and by his words. They cannot claim as his that which he declared or admitted was another's. *Hebert v. Sage*, 29 Annual, 511. *Stewart v. Mix*, 30 Annual, 1036.

The conjecture of the plaintiffs is that he submitted to having the deed taken in the name of his wife because he had been indicted for selling liquor illegally. There is proof, satisfactory to us, that the purchase price of the property bought at the first sale, was the wife's. The second purchase was after the institution of her suit for divorce and separation of property, and the plaintiffs have no claim upon it, and so the lower court adjudged. But the first purchase was erroneously decreed to belong to the community.

We can deal with only a part of the case now. The claim of the defendant for a sale of the property of the testator, and a re-imburse-

ment of alleged paraphernal funds out of the proceeds, must be adjudicated below. The rights of the defendant in all matters, not embraced in our decree, are reserved.

It is ordered, adjudged, and decreed that the judgment of the lower court is avoided and reversed, and that the property conveyed to the defendant by deeds of October 24 1856 and December 15, 1877 is decreed to be her individual and separate property, and not liable to be partitioned as a part of the succession of Caspar Weisz—that the rights of the defendant in all other matters set up in this suit are reserved—and that the cause be remanded for further proceedings according to law, the plaintiffs paying costs of appeal.

No. 7112.

SUCCESSION OF ELIZA P. MACIAS.

A legacy left to a minor grandchild of the testator on condition that the property composing the legacy shall remain under the administration of the testator's executor until the legatee's majority is a valid disposition, and the father of the minor, as natural tutor, has no right to claim the administration of the property.

APPEAL from the Second District Court, parish of Orleans. *Tissot, J.*

Sam. P. Blanc for executor appellant.

A. & W. Voorhies, Louque & Fernandez for appellee.

The opinion of the court was delivered by

DEBLANC, J. In 1876, on the 8th of September, Mrs. Eliza Peck Macias made a testament, in and by which she named one Luc Beebe as the executor of her last will, with seizin of the whole of her succession, and—as her universal legatee—her granddaughter Marie, then aged nine years and a half, and born of the marriage of her daughter with Doctor Octave Anfoux. Shortly after, on the 12th of December and by a codicil, she left to Mrs. Auguste Dubuclet—besides four lots of ground and some furniture—the sum of two thousand dollars.

The testament and codicil were presented to the court, their execution and registry ordered and letters testamentary delivered to Luc Beebe.

Mrs. Macias died in January 1877; Mrs. Anfoux died before her mother, divorced from her husband. At the death of her grandmother, Marie who—until then—had been in the custody of said deceased—passed into that of her father, who was confirmed as her natural tutor, and who—in that capacity—contends that there is no necessity to subject the estate of Mrs. Macias to the costs of an administration, claims

to be put in possession of said estate and to administer the same as tutor of his child.

From the allegations and prayer of the tutor's petition, the object of his action is to recover the legacy made by Mrs. Macias to her grandchild, to enforce the right acquired by the latter, under a testament, the execution of every clause of which is ordered by the decree of a competent court, and one of those clauses directs that the whole of the tutrix's estate shall be administered by the executor of her will, without the intervention of any body else, until the majority of her granddaughter and universal legatee.

The tutrix could have disposed in favor of any one, and deprived her descendant of two thirds of her estate, and—it may be—would have done so, had she imagined that the condition attached to her donation could not be sanctioned by the courts of the State, and that—against her manifested will—her estate would pass into the hands of her son-in-law, as tutor of her legatee. This it was her declared intention to prevent, for she expressly enjoins that Dr. Anfoux, who—as her debtor—then held and still holds more than the legitimate portion of which she could not have disposed to the prejudice of her granddaughter, shall be excluded from any participation in the affairs of her succession.

A conditional legacy—when the conditions imposed by the testator are neither impossible nor reprobated by law—must and can be accepted by or for the legatee but in accordance with the terms of the will. Whether of age or under age, the legatee cannot be allowed to divide his acceptance, to take the donation and repudiate the conditions on which it was made, or take it on conditions which differ from those fixed by the donor. He must accept it as it is, or reject it.

C. C. 936 (980)—1016 (1009)—976 (971).

The condition of the donation made by the testatrix is that whatever she left to her granddaughter, shall—until her legatee's majority, be administered by the executor of her will. That is not an impossible condition. Is it one reprobated by our legislation? It is not, and no reason can be suggested why it should be reprobated. Those who—by their labor, frugality or otherwise—acquire an estate, should not be restricted in the undeniable privilege which they have of disposing of that estate as they please, and so as to gratify their affections, hatreds or caprice. Those who have no right to claim that which is tendered to them as a favor, as a testimonial of friendship or esteem, should not be permitted to accept the favor and disregard any legal conditions on which it was tendered.

In this instance, the testatrix named her universal legatee, gave her less a fraction—all that she left. The title to what she thus gave vested in the legatee from the date of her death, and—had she died after her

grandmother—that title would have passed to the legal representatives of the legatee. The condition imposed by a clause of the will, and it does not appear to be an extravagant one, is that said legacy be not placed under the control of one who was the debtor of the testatrix, who disputed the validity of her claim against him, and who—now—owes to his child and ward that disputed claim, which forms the largest part of the grandmother's donation. The clause referred to merely suspends, until the minor attains the age of majority, the delivery of what she has already acquired under the approved and registered will of her ancestor.

In Clague's widow vs. Clague's executors, reported in the 13th L. p. 6, our esteemed predecessors, held that "a disposition by which the property of the estate was to remain in the hands of the executor until the majority of the testator's children and legatees, was a *fidei commissum*, because then the executorship expired at the end of the year, reckoning from the commencement of the seisin, and the testator had not the power to extend the period fixed for its termination.

The law now provides that "executors shall continue in office until the estate be wound up, and—in this instance—Mrs. Macias has merely postponed the delivery, until her grandchild's majority, of the legacy of nearly the whole of her estate, to the absolute ownership and entire revenues of which her legatee is actually entitled, and has been entitled from the death of the testatrix.

That disposition does in no way—change the order of inheritance, create a new tenure of property, tie up an estate in perpetuity, place it for any length of time out of the reach of any legal alienation, vest a title in one, the beneficiary interest in another; and as—thereby—no donee or legatee is charged to preserve until death and then return any thing to another, or given any right which is to pass to any other at a specified period or upon a specified condition—and, in as much also as by its terms, the testatrix merely provided that the legacy, which is a part of her *unsettled estate*, should—as the estate itself—be left in the hands of an agent selected by her, recognized by our laws, qualified under the decree of a competent court, that disposition—ignored but as yet unassailed—has none of the elements which constitute either a substitution or *fidei commissum*, and—by inference—seems to be authorized by the article of the Code which indefinitely extends the duration of the executorship, and that which declares that "a father or other ascendant can order—by his will—that no partition shall be made among his minor children or minor grandchildren during their minority," in order—doubtless—to protect the inheritance against the errors or misfortunes of a tutor's administration, and to more effectually secure the succession to the heirs or legatee. C. C. 1301 (1224) 1373.

Succession of Macias.

Those reasons dispense us from discussing the other questions raised by the parties' counsel. We, however, consider it advisable to state that the clause of Mrs. Macias' will which excludes, from any participation in her affairs, the father of her universal legatee, can not prevent him from supervising as tutor—unless his pretended incapacity be judicially ascertained and declared—that branch of the executor's administration which relates to the interest of the minor in the succession of her grandmother; and—to guard said interest—he can, if necessary, require from the executor new and additional security for the faithful performance of his duties, and as often as the law prescribes. R. C. C. 1673.

It is—therefore—ordered, adjudged and decreed that the judgment appealed from is annulled, avoided and reversed, and plaintiff's demand rejected at his costs in both courts.

Rehearing refused.

No. 6999.

SUCCESSION OF STEPHEN D. LINTON. ON OPPOSITION TO THE EXECUTOR'S ACCOUNT.

The debts of the succession of a deceased person must be paid in preference to the debts of the deceased.

In determining the amount to be allowed to an attorney for professional services in behalf of a succession the court will be guided by the extent and character of the services rendered, and also by the size and value of the succession.

An executor who administers a succession which has already been partially administered, can only claim a commission proportioned to his services. The fact that his predecessor in the administration received no commission will not entitle him to make any additional claim.

An executor is entitled to a commission of five per cent on any sum not embraced in the inventory and actually collected by him.

An executor in filing his account has no right to reserve an amount in blank for discharging the necessary remaining expenses of closing the succession.

A PPEAL from the Parish Court of Rapides. *Clements, J.*

R. J. Bowman for executor and appellee.

Jas. G. White, A. Cazabat, B. F. Jonas, Breaux, Fenner & Hall, Merrick, Race & Foster for opponents and appellants.

The opinion of the court on the original hearing was delivered by DEBLANC, J., and on the rehearing by SPENCER, J.

DEBLANC, J. J. M. Wells, Junior, the public administrator of the parish of Rapides, took charge—as executor—of the succession of Stephen Duncan Linton, since the 7th of July 1873. The only property of any value then owned by the succession and with which he has had any

Succession of Linton.

thing to do, was a plantation appraised in 1870 at \$24,000—in 1875, at \$18,000, and which—on the 17th of March 1877—was sold at public auction for \$5500. Before 1873, the succession of Linton was under the administration of O. K. Hawley, the then public administrator of the parish of Rapides.

On the 9th of April 1877, Wells filed—as executor of said succession—a provisional account of his administration, and the State National Bank and Charles Fenner oppose the allowance of nine of the items therein charged against said succession, to wit :

1. Two different commissions of five per cent each, claimed by the executor, one computed on \$18,000, the amount of the inventory of 1875, the other on \$600, the amount of rents which he alleges that he has collected.
2. Four accounts of R. J. Bowman—an attorney at law, aggregating \$2600, for professional services.
3. A fee of \$600 acknowledged by the executor as due to R. P. Hunter, and transferred by the latter to William Grant.
4. A claim of \$300 of Race, Foster & Merrick, for services in a federal court, and
5. A charge in blank for unforeseen expenses.

The opponents are creditors of the estate for more than one hundred thousand dollars, and they complain that out of \$6100, the entire amount to be distributed, the executor proposes to retain for himself and to pay to his attorneys the sum of \$4430, leaving to be divided among themselves and others a balance of \$1670.

This court has, long since, justly held “that the debts of a succession, like those of a ceding debtor, are of a higher dignity, and are to be paid before those of the deceased, or of the insolvent. As to them, it is not merely a question of privilege: the services nominally rendered to the estate are, in reality, rendered to the heirs and creditors themselves.”

3 M. 364.

It is always—for a court—a delicate task to fix the disputed value of an attorney's compensation. In this instance, it is as difficult as delicate—for, the evidence shows that the professional services, for which the compensation is claimed, have inured to the benefit of the succession, and that they are worth the amount allowed by the lower court; but the evidence also shows that—if allowed in full—the fees and commissions carried in the provisional account would absorb more than two thirds of the entire assets of the succession.

In 12th R. 414 Judge Martin—the organ of the court—said: “The labor of an attorney ought to be rewarded according to its nature, extent, and the degree of skill and care it demands. The care is certainly

Succession of Linton.

increased by the value of the estate, etc." We consider—as did our predecessors—that, in matters concerning successions—where there is no hope of recovery beyond what the deceased has left, when the question is less what is due than what can be paid, the attorney's fee should be measured to the proportions of the estate.

The succession of Linton appears to be more than twenty times insolvent, and—we are bound to presume—was completely insolvent from the day on which it was opened. It is and ever was the property of its creditors. This being conceded, to do what he has done, to secure for them a sum of \$5500, what is it reasonable to believe that those creditors would have been disposed to offer and allow to Mr. Bowman?

The plantation and the rent due for the same composed the whole succession of Linton, and that plantation had passed from its possession. To recover that property, a suit had become necessary, and that suit was conducted by Mr. Bowman in the district and Supreme Court. Without his efforts and his services, the succession would have been composed of exclusively debts and charges.

Under these circumstances—when, so far as we are informed, the whole of the troubles and labors of that litigation devolved on the attorney, is it probable that he would have been offered or would have accepted less than one third of whatever he would secure for the succession? His efforts were successful, and we consider that—for all the services which he has rendered to said estate, up to the time when this appeal was submitted to this court, he is entitled to one third of the assets which were realized by his industry—that is one third of \$5500.

This view dispenses us from discussing whether the succession is or is not liable for the other claims of said attorney, as, under any circumstances, it would be inequitable to allow him less than we propose to do, for those services which—it is admitted—have been rendered to and are chargeable to the estate.

The cause which induces us to reduce Mr Bowman's fees, justifies the reduction of that of Messrs. Race, Foster & Merrick, from \$300 to \$250. As to Mr. Hunter's claim, it was already partly disallowed, and we leave it as fixed by the parish court.

The succession of Linton was opened in 1867, and it was in July 1873 that Wells took charge of the same. It had then been partially administered by Hawley; the inventories were made, suit had been brought, and it is evident that—at that date—at least one half of what was to be done to settle the succession of Linton had been accomplished, and it matters not whether Hawley did or did not receive any commission: his successor's administration was a fractional one, and he can justly claim but a commission proportionate to his services, and that is—at most—two and a half per cent on the inventory of 1875, or \$450.

Succession of Linton.

The Code so expressly provides and this court has thus invariably held. R. C. C. 1069—1201—5 N. S. 229. 1 R. R. 400, 3 A. 624—4th A. 386.

As to the rent of six hundred dollars, no mention of it is made in either of the inventories, and presuming—as we do—that it was collected by Wells, we are of the opinion that he is entitled to a commission of five per cent thereon.

Were it not that the succession of Linton is absolutely insolvent—that it appears to have been renounced by his heirs, and that the parties to this controversy have placed before us an admission that, since July 1873, it has been administered upon by Wells, in his capacity as public administrator of the parish of Rapides—we would have, under his own pleadings and according to the views expressed in the matter of the succession of François Bougère, lately decided by ourselves, reduced his commission to one half of that of a dative executor; but we are precluded from doing so, by the aforesaid admission and the uncontradicted presumption that the estate of Linton is vacant.

The opposition to item No. 29 of the account cannot be sustained. That item, though in blank, provides for exclusively the costs of filing and homologating the account. The amount of those costs is fixed by law, and, as that amount was not and could not have been positively and correctly ascertained when the tableau of intended distribution was deposited in court, the creditors' right can—in no way—be affected by the mere mention that—whatever they may be—they will have to be deducted from and paid out of the funds to be distributed.

It is, therefore, ordered, adjudged and decreed that the judgment of the lower court is amended, and that in lieu of the several amounts to them allowed in the provisional account filed by J. M. Wells, Junior, as executor of Stephen Duncan Linton, R. J. Bowman is hereby allowed eighteen hundred thirty-three dollars and thirty-three and one third cents—Race, Foster & Merrick two hundred and fifty dollars—and said Wells four hundred and eighty dollars.

It is further ordered, adjudged and decreed that—as amended—the judgment of the lower court is affirmed: the costs of the appeal to be paid *in solido* by the said J. M. Wells, Junior—R. J. Bowman, Race, Foster & Merrick and William Grant.

The Chief Justice recused himself in this cause, having been of counsel.

ON REHEARING.

SPENCER, J. The rehearing in this case was granted in order to reconsider the allowances made by us for attorneys' fees.

The evidence shows that the estate consisted uniquely of the plantation, for the recovery of which the attorneys' fees are claimed.

As the attorneys would have received absolutely nothing had their efforts failed, we do not believe any attorney in good practice would under these conditions have undertaken the litigation in prospect at a less per centum than we have allowed.

We see no reason to modify our former opinion and decree herein, and it is ordered that the sum remain undisturbed.

No. 7045.

MRS. ELISE LABAUVE VS. HENRY R. SLACK, EXECUTOR.

When the heirs are either present or represented in the State, it is necessary to join them with the executor, as parties to an hypothecary action. In such case the executor alone is not capable of standing in judgment.

A proceeding in execution of a judgment of this court which is not in conformity with the terms of the judgment, may be enjoined.

In an hypothecary action against a third possessor who is not the judgment debtor, no other property is liable to seizure but that on which the mortgage rests.

A judgment against defendants not legally capable of standing in judgment is a nullity, and can not be pleaded as *res adjudicata*.

APPEAL from the Fifth Judicial District Court, parish of Iberville.
McVea, J.

Barrow & Pope for plaintiff and appellee.

Samuel Matthews, and Merrick, Race & Foster for Joseph Woolfolk, appellant.

The opinion of the court was delivered by MARR, J., on the original hearing, and on the application for a rehearing by SPENCER, J.

MARR, J. Zenon Labauve recovered two judgments against Mrs. Emily Woolfolk, and against her son Joseph B. Woolfolk for one half the amount in each case, which were inscribed August, 1865, as judicial mortgages against their real property in Iberville parish. In September following Joseph sold to his brother, Austin Woolfolk, Jr., his undivided interest, as one of the heirs of their father, Austin Woolfolk, Sr., and of their brother Samuel, being nineteen one hundred and sixtieths of a plantation and three separate parcels of land in Iberville. This undivided interest, therefore, went into the ownership of Austin Woolfolk subject to the two judicial mortgages which rested upon it for Joseph's half of the two judgments in favor of Labauve.

Joseph B. Woolfolk was adjudicated a bankrupt; and on the 22d June, 1869, he was finally discharged from debts and liabilities existing on the 29th February, 1868. This terminated his personal liability on the two judgments.

In August, 1869, on their petition filed 10th June, 1869, Austin Wool-

folk and his sisters Sarah and Louisiana obtained a judgment in the parish court against their mother, Mrs. Emily Woolfolk, decreeing a partition, and a sale for partition, of the property of the succession of Austin Woolfolk, Sr. Joseph Woolfolk was not a party to this suit; nor does there seem to have been any occasion for making him a party, since four years before he had sold his entire interest in the property to his brother Austin; and if he had any pecuniary rights in the succession or against any person whomsoever, prior to the 29th February, 1868, they passed to and vested in his assignee in bankruptcy; and he had not the legal capacity to assert or to enforce them.

Certain creditors of Mrs. Emily Woolfolk intervered and opposed the sale, and arrested it by injunction. The case came before this court, in 1870, on the appeal of the Woolfolk heirs from the judgment overruling their motion to dissolve the injunction. This appeal was dismissed on the ground that the judgment was interlocutory: 22 An. 206. The case having been remanded to the parish court, the heirs excepted to the jurisdiction of that court to entertain the intervention of the creditors; and the judgment of the parish court maintaining the exception was affirmed by this court. 24 An. 282.

Meantime Zenon Labauve died; and Mrs. Elise Labauve, widow and usufructuary, brought suit in the district court to annul the judgment of partition, and she enjoined the sale. This case terminated in May, 1874, by a decree of this court, affirming the judgment of the district court which dismissed the suit, and dissolved the injunction with \$550 damages. 26 An. 440. There being no longer any obstacle to the execution of the judgment of the parish court in the partition suit, the property was sold at public auction, on the 3d December, 1874.

It may as well be stated here that Mrs. Labauve, Hernandez, and others, creditors of Mrs. Emily Woolfolk, intervened in the parish court, and opposed the homologation of the partition. We were of opinion that the parish court was without jurisdiction of the partition suit, and that the proceedings were void *ab initio*, because the succession of Woolfolk had been closed before that suit was brought; and the judgment dismissing the intervention and opposition of the creditors was reversed. On rehearing, we saw no reason to change that opinion; but a more careful examination of the record showed that there was no proceeding pending to homologate the partition, at the time these creditors intervened; and our final decree dismissed their intervention and opposition as in case of nonsuit. 30 An. 140.

In 1871 Austin Woolfolk, Jr., died, leaving a last will by which, reserving to his mother her portion as forced heir, one third, he gave one half the residue of his succession to his brother Joseph, and the other half, in equal portions, to his sisters Sarah and Louisiana. That is: to

Labauve vs. Slack.

the mother, one third: to Joseph, one third, and to Sarah and Louisiana, each, one sixth. At the sale for partition the entire real property in Iberville, which belonged in common to the three surviving Woolfolk heirs and their mother, was adjudicated to Joseph and his two sisters in equal undivided portions.

In July, 1874, shortly after the decision reported in 26 An. 440, Mrs. Labauve brought suit against Henry R. Slack, testamentary executor of Austin Woolfolk, Jr., to subject to the two judicial mortgages already mentioned the nineteen one hundred and sixtieths sold by Joseph to Austin Woolfolk in 1865.

Slack plead the bankruptcy of Joseph and his discharge as an extinguishment of the judgments: that the suit was an attempt to hold Joseph personally liable notwithstanding his discharge; and that it was without legal foundation. Joseph intervened and adopted the defenses set up by Slack; and he plead other matter, which need not now be noticed further than to say that it constituted no defense to the action.

From the judgment of the district court rejecting her demand Mrs. Labauve appealed; and this court reversed the judgment of the district court, and decreed that the property be seized and sold, and the proceeds applied to the two judgments in favor of Labauve. 28 An. 296.

On this decree a writ issued commanding the sheriff to seize and sell "nineteen one hundred and sixteenth parts," 19-116, of the plantation and the three parcels of land, of which Austin Woolfolk had owned nineteen one hundred and sixtieths by purchase from Joseph, and the like quantity in his own right as one of the heirs of his father and brother. The sheriff made the seizure in accordance with the writ, and advertised the property for sale on the 2d September, 1876. On the 1st September, this suit was brought by Joseph B. Woolfolk, Louisiana T. Woolfolk, joined and assisted by her husband, Henry R. Slack, all residing in Iberville parish, and Sarah J. Woolfolk, joined and assisted by her husband William H. Simrall, residing in the parish of Pointe Coupée, to enjoin the sale. The injunction was granted on that day; and on the same day, 1st September, as is stated in the return, the sheriff, by order of the attorneys of Mrs. Labauve, released the seizure, and returned the writ unsatisfied.

The petition charges, substantially: That Mrs. Labauve had made herself a party to the partition suit by her several interventions and injunctions: that she is bound by the proceedings; and that they constitute *res adjudicata* against her.

That the sale at which petitioners purchased was a public judicial sale, by which pre-existing mortgages were extinguished as against the

Labauve vs. Slack.

property, and transferred to the proceeds. That petitioners have always been ready and willing to pay to Mrs. Labauve the proportion of the proceeds due to the mortgage held by her, which had never been demanded; and that they now tender the amount to her.

That Sarah and Louisiana were never parties to the suit of Mrs. Labauve v. Slack, Executor; and they are not bound by the judgment rendered therein; and that Mrs. Labauve has no judgment of the Supreme Court authorizing the order of seizure and sale which she caused to issue, by virtue of which the sheriff has seized and advertised their property for sale.

The prayer is for an injunction restraining and prohibiting Mrs. Labauve and the sheriff from further proceeding to execute "the order of seizure and sale, by virtue of which he has seized and advertised for sale nineteen one hundred and sixteenths undivided parts of petitioner's property on the 2d September, 1876."

Petitioners also pray that all mortgages existing on the property at the date of the partition sale, 3d December, 1874, resulting from the judgments of Zenon Labauve against Emily Woolfolk and Joseph B. Woolfolk, be decreed to be extinguished and no longer existing against the property of petitioners' purchased at the partition sale; and that they be canceled and erased.

Mrs. Labauve excepted on four grounds:

1. That all the matters set up against the execution of the judgment in the suit of Labauve v. Slack could have been and were made grounds of defense; and can not now be plead as grounds of injunction.

2. That the judgment in the suit against Slack is *res adjudicata* against all the parties, they all being represented by him as executor.

3. That the petition asks the court to enjoin a judgment of the Supreme Court.

4. That the seizure of more than the interest of the mortgage debtor is no ground for these parties to enjoin the sale and execution, much less for that portion covered by the mortgage.

The exception concludes with a prayer for the dissolution of the injunction, with twenty per cent general damages, ten per cent interest, and five hundred dollars special damages for attorney's fees.

The judgment of the district court overruled the exception as to Sarah and Louisiana, but maintained it, and dissolved the injunction as to Joseph Woolfolk, with fifty dollars damages. He appealed: and Mrs. Labauve prays in her answer that the judgment appealed from be so amended as to allow her twenty per cent damages, and \$500 for attorney's fees, as claimed in the exception.

We do not find in the transcript any reasons assigned by the dis-

trict judge for this judgment. As no appeal was taken from the judgment as to Sarah and Louisiana, we have no power to review it; and our inquiry must be limited to the judgment against Joseph Woolfolk.

FIRST. As to the first ground of exception, it suffices to say that the want of proper parties was not plead in the suit against Slack, executor; nor does it in any way appear that this defense was brought to the notice of the court or passed upon by the court.

SECOND. As to the second ground: the suit of Labauve v. Slack, executor, was an hypothecary action, a real action. C. P. art. 4, 41, 42, 61, 62, 68. Elwyn v. Jackson, 14 La. 413, 414; and neither in the hypothecary action, nor in any other real action, does the testamentary executor represent the heirs who are present or represented in the State. He is without legal capacity to stand in judgment alone in a real action if the heirs are either present or represented in the State; and all the heirs present or represented must be joined with the executor as defendants. C. P. art. 123; Cronan v. Executors of McDonogh, 9 An. 302.

THIRD. As to the third ground: The decree of the Supreme Court ordered to be seized and sold nineteen one hundred and sixtieths. The writ did not conform to the decree. It commanded the sheriff to seize and sell nineteen one hundred and sixteenths; and he followed the writ in the seizure and advertisement. The petition did not ask the court to enjoin the decree of the Supreme Court; it asked for an injunction against further proceeding under the writ and seizure.

FOURTH. As to the fourth ground: under a *fleri facias*, any property of the judgment debtor not exempt by law may be seized. If the sheriff should make an excessive seizure, the defendant might be relieved, and the seizure reduced on motion, and proper showing to the court from which the writ issued. If the property of a third person should be seized under the writ, he might enjoin. In the hypothecary action, where the owner or possessor of the incumbered property is not the judgment debtor, he is not personally liable. The decree declaring the property subject, and ordering it to be seized is a decree *in rem* against the specific property. The owner or possessor is called, in legal parlance, the "Third Possessor." No other property is liable but that on which the mortgage rests; and if the writ commands the seizure and sale of any other property of the third possessor than that decreed to be subject to the mortgage, the third possessor, like any other third person, may protect himself by injunction.

As the seizure was released and the writ returned by order of the seizing creditor on the day the injunction was granted, the day before that fixed for the sale, the injunction could not have caused any damage whatever. The injunction simply arrests further proceeding under

the writ until the alleged causes of injunction can be heard and determined. It does not operate a release of the seizure, nor does it require a return of the writ. On the contrary, while the sheriff is bound to desist from further proceeding, he is also bound to retain the writ, and to hold the property under seizure until the injunction is finally disposed of. In the event of its dissolution he must complete the execution by proceeding to sell the property seized, as commanded by the writ. The order of the seizing creditor, to release the seizure and return the writ, can not be construed otherwise than as a confession of the existence of legal cause for arresting the execution, and the consequent abandonment of the entire proceeding under the writ. The court erred, therefore, in awarding damages against the appellant.

As Austin Woolfolk was not the judgment debtor, and was not personally liable, he was the third possessor of the property incumbered by the two judgments in favor of Labauve; and whether this property, at the time the suit of Mrs. Labauve against Slack, Executor, was brought, was in the possession of Slack as testamentary executor, or of the heirs under the will of Austin Woolfolk, it was neither in the possession of the debtor nor of his heirs. When hypothecated property is thus situated the hypothecary creditor can reach it only by an action against the third possessor or possessors, to compel him or them to give it up, or pay the amount for which it stands hypothecated. "This is the hypothecary action, properly speaking;" a real action, as defined by the Code of Practice, arts. 41, 42, 61 to 68 inclusive; and by this court in *Elwyn vs. Jackson*, 14 La. 413, 414.

In *Citizens' Bank vs. Buisson*, 7 Rob. 506, Buisson was executor of Pichot; and he was in the actual possession of property mortgaged by Pichot to the bank. The bank commenced proceedings against the property, *via executiva*, which the court said section twenty-four of the charter authorized, notwithstanding the death of the mortgagor, or any change of title or possession, by any means or cause. This proceeding was abandoned, that is, by supplemental petition it was changed to the *via ordinaria*; and Buisson was cited as *the person in possession*, not as the executor of the deceased mortgagor. The court of original jurisdiction rendered judgment against Buisson, "who had been cited merely as the actual possessor of the mortgaged premises," for a sum to be paid by him in his capacity of testamentary executor. This was held to be error. The judgment was reversed, and a decree rendered ordering that unless Buisson, "the person in actual possession of the mortgaged premises," should pay, etc., the mortgaged property should be sold, etc.

The suit of Mrs. Labauve vs. Slack was brought against the testamentary executor alone. She alleged the death of Austin Woolfolk; and that his succession was being administered by Henry R. Slack,

as testamentary executor. She did not allege that Slack was in possession of the property, nor did she proceed against him as the third person in actual possession. She prayed that he be cited "in his capacity aforesaid;" and that the mortgaged property be seized and sold, etc., "unless said Henry R. Slack in his capacity aforesaid" should pay, etc. That is, she sued Slack in his capacity as testamentary executor of the former owner, which the court said in Buisson's case, 7 Robinson, could not be done.

As this was purely an hypothecary action, in which no personal liability was asserted, it was a real action: and in Cronan vs. McDonogh's Executors, 9 An. 302, which was a real action, this court said the executors were without capacity to stand in judgment alone in the controversy, citing and relying on article 123 of the Code of Practice. This article declares, in very positive terms, that if the heirs are present or represented in the State, "none but personal actions can be brought against the testamentary executor alone. ALL REAL ACTIONS, such as those of revendication and the like, MUST BE BROUGHT BOTH AGAINST THE TESTAMENTARY EXECUTOR AND THE HEIRS PRESENT OR REPRESENTED."

As all the heirs resided in the State, they were all present, in the sense of the law; and they could all have been cited, either personally or at their domicile if temporarily absent. If the intervention of Joseph made him a party, he and the executor were the only parties defendant; and if the executor was without capacity to stand in judgment alone, he and one of the heirs were equally incapable. There can be no judgment without parties legally capable of standing in judgment. The right of Mrs. Labauve was indivisible. She sought to enforce her judicial mortgages against an undivided interest in real property, an entirety which had belonged to Austin Woolfolk; and which, by his will, had passed, *in indiviso*, to his mother, his brother, and his two sisters. The decree which declared that undivided interest subject to the mortgages of Mrs. Labauve effected and condemned to be sold an entirety, the property of all these four heirs; and according to the Code of Practice, article 123, all four were necessary parties to the suit.

The mere reading of the opinion in 28 An. 296, shows that the court considered and passed upon no other defenses than those set up in the pleading. It is manifest, and the court properly so held, that the discharge of Joseph in bankruptcy did not release Austin Woolfolk's property from the judicial mortgages in favor of Labauve. If the attention of the court had been called to the want of capacity in the executor and one of the heirs to stand in judgment alone, the court would have been compelled to have passed upon that question: and we entertain no doubt but that the cause would have been remanded, in order that all the heirs might be cited, as was done in Cronan's case, 9 An. 302.

Be that as it may, the decree in 28 An. 296, 297, does not conclude Joseph Woolfolk, because no personal judgment was asked for or rendered; and the persons who were defendants in the suit were incapable of standing in judgment in the controversy. There can be no greater nullity than a judgment without parties defendant; and defendants without capacity to stand in judgment can not give the court jurisdiction to pass upon the subject matter in controversy.

A decree ordering the seizure and sale of an entirety can not be enforced otherwise than by the sale of that entirety. The entirety can not be sold in this case, because one only of the four owners of that entirety was a party to the proceeding; and Joseph Woolfolk had the right to join with his co-owners in a suit to prevent the sale of the entirety under a decree not rendered contradictorily with all the owners representing that entirety. The district court erred in maintaining the exception as against Joseph Woolfolk. It should have been overruled absolutely.

It is therefore ordered, adjudged, and decreed that the judgment appealed from in so far as it maintains the exception and dissolves the injunction with damages as to Joseph Woolfolk, be and it is annulled, avoided, and reversed: that the exception herein taken and pleaded by Mrs. Elise Labauve be overruled: that the cause be remanded for further proceedings according to law and the views herein expressed; and that Mrs. Elise Labauve, appellee, be condemned to pay the costs of the exception in the district court, and the costs of this appeal.

ON APPLICATION FOR REHEARING.

SPENCER, J. This case presents the "hypothecary action proper. C. P. 68. It is the pursuit of a thing—a proceeding *in rem*, as contradistinguished from a proceeding *in personam*. The latter bases itself upon personal obligation, the former does not. The Code declares that an action "to recover a sum of money," "accompanied by a mortgage," is not a real action. C. P. 12. But art. 61 declares that "the hypothecary action is a real action." Art. 62 declares that "like all real actions" it follows the property into whatever hands it goes.

We understand, therefore, that when the creditor asserts a personal obligation secured by mortgage, i. e., proceeds against the mortgagor or his heirs to enforce his debt and mortgage, the action is not real. But when the possessor is under no personal obligation to pay the debt, i. e., when the suit proceeds exclusively *in rem*, the action is real.

This was the view we expressed in the case of Buckner vs. Wisdom, 31 An. 52, which was a proceeding against the debtor's estate, repre-

sented by an executor in possession of the mortgaged immovable. We see no other mode of harmonizing the provisions of the Code.

Under article 123 C. P., where the heirs *are present*, "none but *personal actions* can be brought against the testamentary executor alone. All real actions, such as those of revendication, *and the like*, must be brought both against the executor and the heirs present or represented.

The theory of the Code seems to be this; that the hypothecary action proper, alternatively at least, demands the surrender and giving up of the immovable itself; and that the power to defend in such action implies therefore in some sort, the rights of alienation and acquisition, since the possessor must elect between giving up the property or paying the debt against it. When the heirs of the deceased possessor are present or represented the law denies to the executor acting alone the exercise of this right of election, this power of alienation, and requires the joinder of the heirs.

The case is different, however, where the deceased possessor was himself the debtor, personally bound for the debt. In that case there is no election. There can be no abandonment, no *quasi* alienation, by giving up the property.

In the case before us we held that this being a purely hypothecary action, and the heirs being present they were necessary parties. We adhere to that view.

The rehearing is refused.

No. 7122.

STATE EX REL. C. E. MOSS VS. A. JUMEL, AUDITOR.

The Legislature is without authority to pass a law reducing the salary of a judge during his term of office.

A mandamus will not issue to compel the Auditor to warrant on a certain fund unless it be shown that the money appropriated to that fund has not been exhausted.

A PPEAL from the Third District Court, parish of Orleans. *Monroe, J.*

B. R. Forman for relator and appellee.

H. N. Ogden, Attorney General, for the State.

The opinion of the court was delivered by

MANNING, C. J. The relator was elected parish judge of the parish of Carroll in November 1876. His term of office was two years. At that time the salary of the office to which he was elected was twenty-five hundred dollars per annum. In April 1877 this salary was reduced by a legislative act to seventeen hundred and fifty dollars. The relator de-

State ex rel. Moss vs. Jumel.

manded of the Auditor of Public Accounts warrants for nine hundred and thirty-seven dollars and fifty cents, which is the unpaid residue of his salary for 1877, computed at the rate of twenty-five hundred dollars per annum. The Auditor refused to issue them, and this proceeding by mandamus was taken to compel his compliance. The mandamus was made peremptory by the lower judge.

The respondent resists the demand upon the ground that the salaries of parish judges are not permanently fixed by the constitution, but are expressly made variable, and subject to legislative alteration. This is true. It was perfectly competent for the legislature to reduce the salaries of these officers. But the question here presented is—can such legislative reduction of salary operate upon the incumbents who took office prior to the reduction, or must its operation be postponed to the close of their term. Or to state it more broadly, can the legislature alter the salary of a judge during his term, and destroy or impair the right he has to the salary, such as it was fixed by law at the time he was inducted into office.

We held in *Collens v. Jumel*, 30 Annual, 861 that the legislature could not deprive a judge of his salary by abolishing his office. Can it retain the office, and diminish the salary *quoad* the officer who was elected under a different law, fixing a different rate of compensation?

Our governments, both State and Federal, recognize three distinct departments—all co-ordinate—each independent in its own sphere. It has been always thought one of the wisest maxims, held and enforced by those sages, whom with filial reverence we are wont to call the fathers of our republic, that the independence of the judiciary could in no wise be impaired—that its freedom of motion, in that orbit prescribed for it by the organic law of its being, could by no device be hampered. They had not forgotten that when the mother-country was struggling in those throes from which has emerged her 'liberty regulated by law,' the greatest instrument of oppression in the hands of the crown was its control over the judges through the precarious tenure of their office, and their absolute dependence upon the sovereign for their annual stipends.

To prevent a recurrence of those and kindred evils, the judiciary was made from the beginning of our government equal to the executive, equal to the legislature, in extent of power and scope of authority in its own sphere. And experience has amply justified the wisdom of those seers who thus erected a barrier to the encroachments of executive power on the one hand, which always seeks to aggrandize itself, and on the other planted a rock upon the solid shore of judicial independence, against which the rushing and passion-tossed waves of popular or legislative frenzy beat unharming.

It would be an empty form—a deceitful promise—to assure independence to the judiciary, if that independence could be at once destroyed by the exercise of a power fatal to its existence. Hence it has been held that the salary of a judge is not taxable, since that would be a diminution *pro tanto* of it. *New Orleans v. Lea*, 14 Annual, 197. In the present case, the power attempted to be exercised is a diminution on a larger scale. If, indeed, a judge's salary can be reduced by a sum however small, there is no limit to its diminution, and thus by reducing it to one dollar or other insignificant sum per annum, a removal would be practically effected which the constitution has provided for in another way.

The Pennsylvania court, in an opinion replete with wisdom, observes that the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the constitution, because it has less capacity or power to injure them. The executive dispenses honours and holds the sword—the legislature commands the purse and prescribes the rules by which the duties and rights of citizens are regulated. The judiciary has no influence over either the sword or the purse. It may be said to have neither force nor will, but merely judgment, and this shews that being the weakest of the three departments of power, it can never attack with success either of the other two, and that all possible care is requisite to enable it to defend itself against their attacks. *Com. v. Mann*, 5, Watts & Serj. 403.

The act of April 1877 can affect only the parish judges who have been elected since its passage. The relator is not in that category, and is entitled to his salary at the rate fixed by the law in force at his election and qualification.

But the sum appropriated by the legislature is not sufficient to pay the relator's salary at the larger rate, and we cannot order the Auditor by mandamus to warrant for more than has been appropriated. While therefore we think the relator's salary could not legally be reduced during the term which had commenced prior to the act reducing it, we must refuse the mandamus because there is no appropriation against which the Auditor can warrant.

The judgment of the lower court is avoided and reversed and the application of the relator for a mandamus is rejected at his costs.

DISSENTING OPINION.

DEBLANC, J. I believe, as my colleagues do, that the power to reduce the salary of a judge during the term for which he was elected, is—manifestly—a dangerous power: but, that it does exist, I entertain no doubt. The 86th article of the constitution of 1868 ordains that,

State ex rel. Moss vs. Jamel.

until otherwise provided, each parish judge shall receive a salary of twelve hundred dollars per annum.

It was soon after the adoption of the constitution *otherwise provided*; the judge's salary was fixed at two thousand dollars in parishes having one member, and in new parishes not yet entitled to separate representation in the House of Representatives, and at two thousand five hundred dollars in parishes having two or more members in the House.

In 1877—during the term for which the relator was elected—the amount of that salary was again changed and that to which he was entitled at the date of his election reduced from twenty-five hundred to seventeen hundred and fifty dollars. Though it may have been inconsiderate, that reduction was not prompted by any improper motive and was authorized by the plain letter of the constitutional provision already referred to.

The relator took the office with full notice that the Legislature could either reduce or increase his emolument, and that, as its power is unrestricted by any express or implied reservation, it could—as it did—reduce that emolument during the term for which he was commissioned.

The act of 1877 was to and did take effect from and after its passage, and, as it repeals all laws or parts of law in conflict with its provisions, the Auditor's warrant can be claimed and obtained but under said act, the only one now in force.

For these reasons, I respectfully dissent from the opinion of the majority, but concur in the decree.

ON APPLICATION FOR REHEARING.

MANNING, C. J. The relator prays a rehearing on one point alone, and it is granted.

ON REHEARING.

We refused to authorize a mandamus to the Auditor because there was no appropriation. The relator reminds us that in the Pennsylvania case, that court made the mandamus peremptory, and insists that we should do likewise. There is a constitutional prohibition of drawing money from the treasury unless specific appropriation has been made, (Const. art. 104) which did not exist there.

The brief of counsel furnishes us with a calculation, showing that the salaries of the parish judges amounted to one thousand dollars less than the sum appropriated, and he urges that we can make the mandamus peremptory for that sum which would cover his claim. But there is no evidence in the record upon this matter. True, we take cognizance

State ex rel. Moss vs. Jumel.

of the acts of the legislature, but this excess of appropriation may have been exhausted by some other applicant in advance of the relator. If he can shew that there has been appropriated enough to pay his claim, and that such appropriation has not been exhausted, we will be authorized to grant his prayer. To enable him to do this, It is ordered that the case be remanded to receive proof relating thereto.

No. 6782.

THE STATE VS. SAMUEL WALLMAN.

An indictment for murder correctly charges that the crime was committed on the day the mortal blow was given, although it appears that the deceased did not die until a day following the blow.

Evidence will not be admitted to show that one of the jurors in a murder case only agreed to the verdict of guilty on condition that a petition signed by every member of the jury should be addressed to the Governor asking that the penalty be commuted from death to imprisonment for life.

A PPEAL from the Superior Criminal Court, parish of Orleans. *Whitaker, J.*

H. N. Ogden, Attorney General, for the State.

McGloin & Nixon for defendant.

The opinion of the court was delivered by

DEBLANC, J. Defendant was indicted for murder, tried, found guilty and sentenced to death. He appealed, and—to reverse the verdict returned by the jury and the sentence pronounced by the court, he relies on two grounds:

1. That, as the charge against him is that he struck the mortal blow on the 13th of October, then and thereby committing the crime of murder, and—as the party thus struck died of the blow on a day following that on which it was given, the crime was not complete until death ensued, and the accused could not—legally—have been found guilty as charged in the indictment.

2. That one of the jurors concurred in the verdict, only after it had been agreed that a petition addressed to the Governor and signed by every member of the jury, would ask the commutation of the penalty from death to imprisonment for life.

I.

We admit—as contended by the prisoner's counsel—that the death of the victim struck completes the crime of murder, but we do not admit that it alone constitutes that crime. The authority relied upon by them holds—and as to this there can be no difference of opinion—that unless death does ensue, the felony is not murder, but another, a lesser offence.

Whether struck with a knife, or inflicted with a pistol, a *mortal* blow carries with it the unfailing seed of a premature and unnatural death; and—whatever may have been the interval between the blow and its result, the commission of the offence dates from the instant, when driven or fired with a criminal intent, the blade of the knife or the bullet penetrates a vital part, and either suddenly destroys or irrevocably abridges the life of another. The crime—that which the law reprobates and punishes—is entirely in its commission, and—in cases of murder—that commission embraces the intent to kill, the infliction of a mortal wound, the immediate death or the certainty of the death of one who fell in the peace of the State and in the peace of God.

We are reminded that “the simplest defence which the accused has to a charge against him is the proof of an *alibi*; and we are asked: how would such a right be protected, if the time laid in the indictment be considered as immaterial? That right would, under all circumstances, be protected by the court; for, were the evidence to establish that the offence was committed on a day different from that laid in the indictment, and—were the indictment amended so as to correspond with the evidence—the prisoner would not, could not be denied a *reasonable* delay to prepare any *reasonable* defence, which he may really have or believe he has against the unexpected, or at least apparently unexpected change in the indictment.

In this regard, the very plain and very imperative terms of the law bear but one, a clear meaning, which no ingenuity can successfully vary, alter or circumvent: “No indictment for *any* offence shall be held insufficient for omitting to state the time at which the offence was committed, *unless*, time be of its essence, nor for stating the time *imperfectly*, nor for stating the offence to have been committed on a day subsequent to the finding of the indictment, or on an impossible day, or on a day that never happened.”

Rev. Statutes, sec. 1063.

The murderer's guilt is attached to the infliction of the mortal blow: the death of the wounded is the result of the blow, the effect of an antecedent cause, and there can be no doubt that the crime dates from and is properly charged to have been committed—not on the day when the victim died from a previously inflicted wound, but on the day the mortal wound was inflicted. Though he proves that—when death ensued—he was at hundreds of miles from the spot, the accused may be convicted—whilst, if he were to prove that he was not present when and where the blow was struck, the jury would be bound to acquit him.

II.

The jury returned against defendant the unqualified verdict of guilty, and when polled under the order of the court, every member of

the jury said that was his verdict. An attempt was made, not to impeach, but to explain it, to show that, on the part of one of the jurors, it was a conditional verdict, that he had agreed to it, with the understanding that he and all the others would address a petition to the Governor, asking the commutation of the penalty from death to imprisonment for life, and under the belief impressed upon his mind by other jurors that such would be the effect of the intended petition. This is the accused's statement. He offered to verify it by the testimony of two witnesses, but the tendered evidence was excluded.

In the case of *Mercer vs. the State of Georgia*, the judges said: "It is urged that the court should have granted a new trial, because Richard Harrison, one of the jury who tried the prisoner, had informed several persons, whose statements appear in the record, that he had not agreed to the verdict, but suffered it to be brought in, because he could not control the rest of the jury."

"In the first place, this assertion of the juror is not sustained by the record: that shows that he did agree to the verdict, in the way which is known to the law. In the next place, a juror cannot be allowed, in this way, to impeach his verdict. The practice is too plainly improper and dangerous to need any comment from us."

17 Ga. Rep. 175.

The allegation—here—is that the juror *did agree* to the verdict, but that he did so conditionally, and what was the condition? That an application would be made for the commutation of the penalty, which the juror *knew* was to be the inevitable consequence of his own verdict. Taking that allegation as it is, what presume and what conclude? Is it that he intended to render a qualified verdict? Is it that he believed in the commission of only a fraction of the crime charged? If so, his deliberate concurrence, and his proclaimed assent to the verdict, would have amounted to a violation of his oath, a disregard of his duty, to not less than a crime, against the result of which the lower court would, most assuredly, have protected the prisoner.

The juror was not taken by surprise: it does not appear that he was deceived; he discussed and deliberated with the others, and he and they answered in open court—at first collectively and afterwards separately—that the prisoner is guilty of murder. Their course justifies the presumption that every one of them had reached the grave conclusion that—under the facts as disclosed on the trial, the law as explained by the judge—the prisoner should pay, with his life and on the gallows, the life which he had destroyed—that, under the facts and the law, they could not—considering the proportions of the crime—reduce the proportions of the penalty. In the discharge of their duty, they so decided and so reported. This was right: jurors are the representatives and

guardians of both society and of those denounced in its name; their protection must extend to *even a doubtful innocence*, but no further. They should show no mercy to merciless offenders.

We think—as held by the Supreme Court of the United States—that “cases might arise in which it would be impossible to refuse the affidavits of jurors without violating the plainest principles of justice;” but, were we to command the admission of affidavits establishing the fact relied upon by defendant, what would they prove? Not that the juror did not agree to the verdict as returned, and which he publicly declared was his verdict; but merely that though he—a sworn juror—could find no reason to decide otherwise than he had done, there—nevertheless—was a reason why the Governor should be asked to alter and reduce the only penalty which could be inflicted by the court. That, which—in their opinion—they could not have done as an act of justice, they were to invite him to do as an act of clemency.

Was the strange promise said to have been made to the juror complied with? Has any one of those by whom it is alleged it was made refused to sign the proposed application? As to this, we are not and could not legally have been informed; but if this last effort to obtain the commutation of the grave penalty, has been delayed in the hope that the verdict would be annulled and the sentence reversed, that hope is no longer in the way of the intended application.

It is—therefore—ordered, adjudged and decreed that the judgment appealed from is affirmed.

No. 5544.

FACTORS' AND TRADERS' INSURANCE COMPANY VS. MARINE DRY DOCK AND SHIPYARD COMPANY.

In order to make the pledge of a certificate of the stock of a corporation valid as to third persons it is not necessary to give notice of the pledge to the company. Where knowledge of a fact by a corporation is necessary, the corporation is held to know concerning that fact whatever its president and other chief officers know. A corporation is liable for the damages caused by the wrongful canceling of a certificate of its stock by its president and secretary.

A PPEAL from the Fifth District Court, parish of Orleans. *Cullom, J.*

Breaux, Fenner & Hall for plaintiff and appellee.

Gibson & Gibson for defendant and appellant.

The opinion of the court was delivered by

SPENCER, J. Kearney, Blois & Co., of New Orleans, pledged, on eighth December, 1869, to the plaintiff, with power to sell, transfer, etc., seventy-seven shares of the stock of the Marine Dry Dock and Ship-

Factors' and Traders' Insurance Co. vs. Marine Dry Dock and Shipyard Co.

yard Company—evidenced by three certificates, No. 1 for twenty-five shares, No. 2 for fifty shares, and No. 59 for two shares—to secure a loan of \$5000.

Kearney, Blois & Co. were the treasurers of the defendant company, and Mr. Blois, of that firm, was its president. The business of the dock company was transacted, and its books kept, at the office of said firm, on Magazine street, New Orleans, though, by its charter, its domicile and offices were nominally in Algiers.

On twenty-fifth January, 1870, said firm—being as stated, treasurers of the company, and one of its members president thereof, and some of them directors—caused the secretary of the company to cancel on its book the above three certificates of stock, and had issued to themselves two new certificates for said seventy-seven shares. These new certificates were entered by the secretary, and signed by Blois, president of the company, and delivered to said firm, without requiring the surrender of the old certificates. Having done this, the firm of Kearney, Blois & Co. pledged these new certificates to other parties, who gave the company due notice of the pledge. On eighteenth May, 1870, the plaintiff addressed a letter to the secretary of the Dock Company, informing him of the pledge, and of plaintiff's right to the dividend that day declared on stock. This letter was delivered to Bernos, of the firm of Kearney, Blois & Co., at their said office. On first June plaintiffs received from the treasurers, their check for \$385, as dividend on the pledged stock. The parties to whom Kearney, Blois & Co. had pledged the new certificates foreclosed their pledges and bought in the stock and had it transferred to them on the books of the company in August, 1870.

When the plaintiff's transferee, Barton, presented the old certificates for transfer on the books of the company, it was refused on the ground that the stock for which they called had already been transferred to other parties by virtue of their holding said new certificates. Barton sought to enforce his rights by law, but failed. This suit is now brought by the plaintiff, the original pledgee, against the Dock Company for damages, caused by the wrongful and fraudulent acts of its agents and officers.

The certificates of this Dock Company declare that the stock is "transferable on the books of the company," and do not contain the customary clause, "on the surrender of this certificate."

The defense may be summarized and considered under the following heads:

First—Was the defendant company entitled to notice of the pledge to plaintiff; and if so, did it have notice thereof seasonably and in due form?

Second—If it was not entitled to notice, or if it had notice, is it liable to plaintiff for damages?

The first of these questions depends upon another; what is a certificate of stock? It is now well settled that a certificate of stock is *not a credit or evidence of debt*, but is merely evidence of ownership of a certain interest in the assets and property of a corporation. See *Harris vs. Bank of Mobile*, 5 An. 538. The corporation is not *a debtor* in the usual sense of that term. In the case of *Samuel Smith et al. vs. Crescent City Slaughterhouse Company*, lately decided and not yet reported, we had occasion to review at length the authorities on this subject, and it will not be necessary to repeat them here. We there held that under the act of twelfth of February, 1852, p. 15, amendatory (and now article 3158) of the Revised Civil Code, that the pledge (and therefore sale) of "promissory notes, bills of exchange, stocks, obligations, or claims upon other persons was valid against third persons without other or further formality than delivery to the creditor of the notes, bills, certificates of stock, or other evidences of the claim, etc., except in the case where the thing pledged was *"a credit not negotiable,"* in which last case the *debtor* must have notice of the pledge or transfer. See, also, 3160 R. C. C.

Certificates of stock not being credits or evidences of debt, do not come within the scope of the stated exception. The law is positive that pledges "of stocks" are valid against third persons by mere delivery of "the certificates." It does not distinguish between negotiable or non-negotiable certificates, nor between those which declare that to effect a transfer the certificate must be surrendered and those that do not so declare.

We think that by thus making stocks transferable by mere delivery of the certificate the law has intended to interdict corporations from transferring stocks on their books, except upon surrender of the certificate, or upon proof of its loss or destruction. These certificates of stock have become such important factors in trade and credit that the law has intended to surround those who take them with the safeguards it accords to the holders of the other great agencies of commerce, bills, notes, bills of lading, etc.

Under this view, it is unnecessary to discuss the question whether the defendant company had notice of the pledge, though we confess that the facts already detailed in this opinion seem to leave little room for discussion on that point. How it can be argued in a case like this, where the question is simply whether a corporation had notice of a fact, and where no particular form of notice is required, that a knowledge of that fact by its president, its directors, and treasurer is insufficient, we are at a loss to understand. A corporation can not see or know any thing except by the eyes or intelligence of its officers. In cases therefore where knowledge in any form will suffice, a corporation must be held to know what its president and chief officers know.

Factors' and Traders' Insurance Co. vs. Marine Dry Dock and Shipyard Co.

Second—These officers having taken advantage of their position as officers to practice a fraud upon the plaintiffs, by wrongfully canceling their certificates of stock, and transferring it in new form to others, things which they could only do by reason of their official position, the corporation is undoubtedly liable for their acts. 38 Barbour, 527.

The judge *a quo* fixed the damages at four thousand dollars, and inadvertently, as stated by himself, allowed eight per cent interest thereon from twenty-third January, 1870. The rate of interest should have been five per cent from judicial demand.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be amended so as to allow on the amount thereof five per cent interest from thirty-first May, 1873, instead of eight per cent from twenty-third January, 1870, and that as thus amended said judgment is affirmed; plaintiff and appellee to pay costs of appeal, and defendant those of the court below.

Rehearing refused.

No. 6631.

WALMSLEY AND PATTERSON, EXECUTORS, VS. MENDELSON & NEWMAN.

The judgment of a court against the liquidator of a partnership for the rent of a store-house used by him is not conclusive as to the surety on the former's bond as liquidator, who was not a party to the judgment.

The surviving partner of a commercial firm who desires to liquidate the affairs of the firm, must demand the liquidation contradictorily with the legal representatives of his deceased partner, and any heir of the latter who may be present, or represented. His *ex parte* appointment and qualification as liquidator are wholly unauthorized.

The surviving partner of a commercial firm is not liable as liquidator, to account to the succession of his deceased partner for any single item of indebtedness to the succession, but to pay over the entire sum found to be due the succession, on the settlement of the partnership.

A suit against the surviving, and liquidating partner, by the succession of the deceased partner, for a settlement, or a partition, must be brought in a court of ordinary jurisdiction.

A PPEAL from the Sixth District Court, parish of Orleans. *Rightor, J.*

H. H. Price and Henry C. Miller for plaintiffs and appellees.

Cotton & Levy for defendants and appellants.

The opinion of the court was delivered by

MARR, J. Thomas H. Patterson, a citizen of New Orleans, died at Altoona, in the State of Pennsylvania, on the 15th July, 1872, leaving a will, by which he appointed Walmsley and Patterson, executors, as we gather from the pleadings.

At the time of his death Patterson and Sigmund Mendelsohn were commercial partners, under the style of S. Mendelsohn & Co. The record does not show at what time the will was presented for probate, and the executors qualified; but on the 20th July, six days after the death of Patterson, Mendelsohn filed a petition in the Second District Court of Orleans, alleging that there was a large stock of merchandise belonging to the partnership: that a full inventory and appraisalment should be taken; and that he as surviving partner had the right to be appointed liquidator. The court ordered that he be appointed liquidator, "on complying with the requisites of the law;" and that an inventory be taken by a notary, and two appraisers, designated in the order, in the presence of all parties interested.

The notary proceeded, on the 25th July, to take an inventory and appraisalment, not of the property of the succession of Patterson, but of the assets of the partnership of Mendelsohn & Co., the estimated value of which was \$44,291 66. The executors of Patterson were not present, nor was the succession of Patterson in any way represented in the proceeding; nor does it appear that any representative of the succession was notified, in any manner, of the *ex parte* application of Mendelsohn to be appointed liquidator, nor of the time and place, nor of the fact of the taking of the inventory. The only persons present were the notary, the two appraisers, Mendelsohn, and the two witnesses. The inventory is merely a statement of the gross assets of the partnership, without any statement of the debts, or balance-sheet, or estimate of, or means of estimating the portion coming to deceased, or the value of his interest in the partnership.

On the filing of this inventory in the Second District Court, Mendelsohn gave bond with Isadore Newman, his surety, in the sum of \$25,000, in favor of "legal representatives" of Thomas H. Patterson, conditioned for the faithful administration of Mendelsohn as liquidator, and that he would render a true, perfect, and just account, when lawfully required by the "legal representatives," or the heirs, or their attorneys. There is nothing to show that the executors had notice or knowledge of this proceeding, or that any representative of the succession took part in it in any way.

On the 5th July, 1873, Mendelsohn filed, in the Second District Court, what purported to be his account as liquidating partner. It begins with a statement of the assets, footing \$43,811 33, and this is followed by a statement of the debts, showing accounts in course of collection \$5010 69, cash on hand \$335 33, and debts unpaid \$4031 66, without any statement of losses or profits or the value of the share of the deceased.

The executors opposed this account, and it was amended by judgment of the Second District Court, by striking out two items, one of

\$100, purporting to have been paid, and one of \$696 66, not paid, and by placing the succession on it as a creditor for \$1800, for rent of the property owned by Patterson, used in the business of the partnership, for the year ending 1st March, 1873. From the judgment homologating the account as thus amended, an appeal was taken; and our predecessors made other amendments, rejecting one credit claimed by Mendelsohn, of \$4583 33, and reducing another from \$1000 to \$500.

The executors caused execution to issue on the judgment homologating the account for \$1800, for the rent, which was returned no property found. Thereupon they brought this suit on the liquidator's bond against Mendelsohn and his surety Newman, in the Sixth District Court, to recover the \$1800, reserving their right to sue for the capital contributed by Patterson to the partnership, and for such other sums as Mendelsohn might be liable for as liquidator. The judgment of the district court was in favor of plaintiffs, for the \$1800, with reservation as prayed for, and defendants appealed.

On the trial Mendelsohn was called as a witness for defendants, to prove that Patterson did not lease the property to the partnership, and that the executors did not lease it to Mendelsohn; and that the succession of Patterson had no right to claim the rent. The court refused to hear the witness, evidently on the ground that the judgment of the Second District Court amending and homologating the account of the liquidator concluded the defendants on the question of liability for the rent. Defendants excepted to this ruling on the grounds, among others, that the Second District Court had no jurisdiction; that the judgment of that court was not binding on the surety; and that the witness would show that he had another account to render; and other charges against the estate.

We think the judge should have heard the witness. Newman, the surety, was not a party to the proceeding in the Second District Court; and he was not concluded by the judgment of that court.

It was the duty of the executors to have an inventory and appraisal made of the property of the succession. If the deceased was in community or in partnership with any one who has survived him, a partition must be effected, in order to ascertain what part of the common or partnership property belonged to the deceased, because that part only belonged to his succession, and would fall under the control and administration of the representative of the succession. R. C. C. 1135.

If the deceased was a member of a commercial partnership, the surviving partner, after the portion of the deceased in the partnership effects has been ascertained, and the estimate of it made on the inventory, may require that this portion shall remain with his own, in order that the whole may be disposed of for the common benefit in the ordi-

nary course of trade, and the proceeds applied, as far as necessary, to the payment of the debts of the partnership. Art. 1138.

This right of the surviving partner is absolute only when the succession is vacant, or all the heirs are absent and not represented. The surviving partner is bound to give security to the legal representative of the succession, for a sum exceeding by one fourth the estimated value of the portion retained by him which was coming to the deceased, according to the inventory. He has one year within which to sell the effects, and to settle the affairs of the partnership; and he is bound to render an account to the legal representative of the succession of the deceased partner, and to pay to him the part due to the succession on the settlement of the partnership. Arts. 1139, 1140.

The Code contemplates and requires that the legal representative of the succession shall qualify, cause an inventory to be taken, take charge of the property, and enter upon the administration. If the surviving partner desires to exercise the right accorded to him to liquidate the affairs of the partnership, he must demand it contradictorily with the legal representative, after the inventory has been made, and the portion coming to the deceased has been ascertained, and its value estimated in the inventory. If any heir of the deceased be present or represented, his consent would seem to be necessary, and, therefore, he should be notified of the application of the surviving partner. Art 1143; McKowen vs. McGuire, 15 An. 637.

Patterson was a citizen of Louisiana, residing in New Orleans, and he had invested a large sum in this business, which was conducted in valuable buildings, alleged to have belonged to him. It is not unfair to presume that all his heirs were not absent and unrepresented, in view of the large interests devolved upon them by his death. At any rate, no law authorizes the surviving partner to take the initiative, and, by *ex parte* application, cause himself to be appointed liquidator, with the right to retain the portion of the deceased partner, to have an inventory made *ex parte*, and to give the requisite bond, and security, without having the same approved and accepted by the legal representative of the deceased partner, or by the court, in case of unreasonable objection.

It is no part of the obligation of the surviving partner and his surety to pay any specific debt to the succession of the deceased. The business of the surviving partner, and this is the obligation of the bond, is to dispose of the effects in the usual course of trade, to pay the debts of the partnership to third persons, to liquidate the affairs of the partnership; and to account and pay over whatever may be found due to the succession on final settlement.

No doubt cases will occur in which the surviving partner might not have been able to liquidate the partnership fully in one year; and in

that event he might obtain a prolongation of the term, where the interests of the succession would be thereby promoted. But whether the term be extended or not, his obligation is the same, to account to the legal representative, and to pay him the portion shown to be due on the liquidation and settlement of the partnership. In the event that any of the effects should remain not disposed of, they might be divided in kind, if susceptible of such division; or be sold at public sale.

The whole object of this proceeding is to effect a partition, a severance of the interests of the deceased and the survivor, in the manner most advantageous to all the parties. The law never intended that, at any time, either during the term fixed, or after its expiration, the legal representatives of the succession should be permitted to bring suit against the survivor for any single item of account which might appear to the credit of the deceased. The obligation of the survivor is entire, to account and pay over the entire amount due, the part and portion coming to the succession on the settlement of the partnership.

This obligation of the surviving partner is an ordinary civil obligation, which must be enforced in the ordinary civil tribunals, having ordinary civil jurisdiction; and it is no more cognizable in a probate court than would be any other obligation to the succession, or a suit for a partition of any property owned in common by the deceased and a surviving joint owner. At the expiration of the term fixed for the liquidation, the legal representative would demand of the survivor an account, and the payment of the amount due. If this should be refused, it would be the duty of the person administering the succession, the legal representative, to proceed, by ordinary action, before an ordinary civil tribunal, to compel the rendering of an account, the final settlement of the partnership affairs, and the payment of the amount due on such settlement; and this suit would be brought against the principal and the surety in the bond.

This account is not to be rendered to the probate court. The probate court deals with the legal representative administering the succession. It requires him to have made and filed in court an inventory of the property of the succession; and to take possession of and administer that property. He could not administer the partnership, nor could he take out of the possession of the surviving partner the portion of the deceased, because one partner has no separate ownership of any of the effects of the partnership, until it is settled in some way, and the partnership debts paid. As representative of the deceased he might, jointly with the survivor, administer the effects of the partnership; or he might provoke a settlement and partition. He could not compel such settlement and partition in the probate court, because such proceeding would not fall within the jurisdiction of that court. When the

Walmsley and Patterson vs. Mendelsohn & Newman.

court permits the survivor to retain the entire property of the partnership for the purpose of liquidation, the law requires him to give bond, not to the judge of the court, as administrators appointed by the court do, but to the legal representative appointed by the court to administer the succession. It is not an official bond; it is an ordinary bond, such as might be required of a person appointed to liquidate a partnership the members of which are still living.

The whole proceeding in the probate court seems to us to have been wrong. We do not mean to say that, to the extent of the bond, the surviving partner and his surety are not accountable to the executors for the part and portion coming to the succession on the settlement of the partnership; but the probate court was without jurisdiction to receive the account, or to amend it, or to homologate it, or to render judgment on it. It was not an account of the administration of a succession, but of the administration of a partnership: It was not an account rendered by the administrator of a succession, but by the administrator of a partnership to the administrator of the succession; and the judgment on that account does not entitle the executors to demand any specific sum as fixed by it.

There was no proof that any sum was due by the partnership for rent, except the judgment of the Second District Court; and that judgment was void for want of jurisdiction. No amount of proof could have authorized a judgment in favor of plaintiffs in this suit; because, as the bond sued on disclosed, and the Code provides, neither the surviving partner nor his surety was liable for any thing more, or for any thing less than a faithful administration by the liquidator, a true and proper account, and such sum as might be found due to the succession on the settlement of the partnership affairs.

The partnership might have owed the succession \$1800 for rent; and yet, on final settlement, the succession might be largely indebted to the partnership. It is the right and the duty of the executors to compel an account and settlement of the partnership; and they have no other right or recourse on the bond.

The judgment appealed from is therefore annulled, avoided, and reversed, and the demand of plaintiffs rejected, and their petition dismissed as in case of nonsuit, reserving to them and to the succession of Thomas H. Patterson all their rights, whatever they may have been, against Sigmund Mendelsohn as surviving partner of the late commercial firm of S. Mendelsohn & Co., and against Sigmund Mendelsohn and Isadore Newman on the bond sued on in this case, plaintiffs, appellees, paying the costs in both courts.

Rehearing refused.

No. 7101.

BOARD OF SCHOOL DIRECTORS OF CONCORDIA PARISH VS. JOSEPH HERNANDEZ.

A duly certified copy of an original record, made by the legal custodian of the original, is admissible in evidence.

Under the authority of the Board of School Directors of a parish, the treasurer of the board may make a valid sale of the warrants of the State which represent that portion of the interest on the free school fund due to said parish.

Where the plaintiff in a suit formally avers that the defendant had collected certain warrants, the property of plaintiff, and prays the defendant's condemnation for the amount of the warrants, he thereby estops himself from subsequently suing another person as the collector of the warrants.

APPPEAL from the Second Judicial District Court, parish of Orleans.
Pardee, J.

Geo. L. Bright for plaintiff and appellant.

Thos. J. Semmes for defendant and appellee.

The opinion of the court was delivered by

MANNING, C. J. The plaintiff claims from the defendant an indebtedness of twenty-five thousand one hundred and thirty-two 99-100 dollars for this, that he collected and received the amount of a series of warrants, which are set forth in detail, issued by the Auditor of Public Accounts, and which belonged to the plaintiff, and aggregate the sum sued for. Interest is also demanded from the dates of their collection.

Upon exception being made that the petition did not set forth any cause of action, and being maintained with leave to amend, an amended petition was filed, alleging that the defendant failed to account to the plaintiff for the moneys collected and received by him, and had appropriated them to his own use. Exception was again made of the same nature as the first, and being overruled, the defendant answered.

After a general denial, he admits that he collected the warrants, but denies that they were the property of the plaintiff, or that he collected them for the plaintiff's account, but that they were his own, and were collected by him as owner—that the warrants were drawn in favour of David Young, then treasurer of the school board of Concordia, who was authorized by a resolution of that board to sell and transfer them, and that he did sell them to plaintiff for a valuable consideration in 1871, and afterwards made report thereof to the board, and paid to it or in its treasury, the sums received at and by that sale, and that such sums were used and applied by the board to the support of the public schools of that parish—that afterwards, in 1872, the board examined the accounts of Young, its treasurer, and settled with him, finding him chargeable with one thousand and ninety-seven 24-100 dollars as the balance in his hands. This settlement is pleaded in bar of this suit. The defendant further avers that the plaintiff instituted suit in 1877 against Young, claiming

Board of School Directors of Concordia Parish vs. Hernandez.

from him as treasurer \$61,502.14, less \$27,589.81 accounted for, which first named sum includes the warrants upon which plaintiff is now suing, and this demand of Young is now pleaded as an estoppel which precludes the plaintiff from contesting the validity of the transfer of the warrants. Finally the prescription of one year is pleaded.

The authorization to sell the warrants is contained in a resolution of the school board, certified as a correct copy by one Cornwall, treasurer of the board, and it was objected to by the plaintiff on the ground that he was not the treasurer, or if he were, that he is not authorized to certify copies of the records of the board. The treasurer is also the secretary. The law makes the one officer perform the duties of the other. Sess. Acts 1871, p. 42. He had legal custody therefore of the records, and as it was his duty to keep the original, a copy certified by him as true was admissible in evidence. 1 Greenleaf's Evidence §485. That he was treasurer, and therefore secretary, is expressly alleged by the plaintiff in its suit against Young, which is part of the documentary evidence in the present suit.

But the plaintiff contends that it could not legally authorize the sale of the warrants by resolution or otherwise—that it had no right to transfer any appropriations made for the support of the public schools, but only to receive and apply them—that school boards are not required nor expected to raise funds for the support of schools, their duty being to establish and maintain schools with funds furnished by the State, and if the State furnished no funds, there could be no schools. For, argues the plaintiff's counsel, if the board could sell the warrants for thirty cents on the dollar, it could sell them for one mill on the dollar and thus could abolish and destroy the schools.

We held in Durant's case, 29 Annual, 77, that the Free School Fund was inalienable, and had been placed *hors de commerce* by numerous congressional and legislative acts and constitutional provisions, and therefore that the bonds, composing that fund, could not be validly sold even under an authorization of the General Assembly, and we have recently re-affirmed what we then said. *Sun Ins. Co. v. Board of Liq.* not yet reported. But these warrants do not enter into, or form a part of the capital of that fund. The interest of the School fund is the means of support of the schools. The boards of directors are expressly authorized to apply that interest to the maintenance of schools. It is, so to speak, the sole income of the schools, and is expected to be spent in their yearly maintenance. These warrants are drawn for that interest. The only way to get the interest out of the State treasury into the local school treasury is to draw a warrant for it. Could the treasurer of the local board assign or transfer that warrant to some one near by the Treasurer's office, who could conveniently get the money, such assign-

ment being made for full face value? Could he sell that warrant to any one for one hundred cents in the dollar? If he could, the power to sell being conceded, he could sell for thirty cents in the dollar, or for fifty-seven cents, which was the price paid by the defendant. The execution of all human laws depend upon and must be confided to human instruments. They cannot foresee, nor provide for, all the contingencies of maladministration, of official dishonesty, or personal perfidy. When the law empowered the treasurer of the Concordia school board to draw the interest to which it was entitled from the State treasury, it surrounded the act with all the safeguards that mere enactments could do. It compelled him to give bond, and it entrusted to others the power to reject that bond for good cause. It could not foresee who would be the treasurer of each local school board, nor prevent the malversation of any of them. Some one had to be designated who should draw the warrant on the Auditor, and who was thus entitled to receive from that officer his warrant on the State Treasurer, and it was for each local board to guard the fund entrusted to it by selecting an officer of approved fidelity as its custodian, and requiring of him ample security for its preservation and disbursement.

What was the treasurer of the local board to do with these warrants? The plaintiff's counsel says, if they were not cashed at the treasury, shut up the schools. If the same rule were applied to the different departments of the State Government, there would be a total cessation of the exercise of all its functions. It is impossible for us to ignore the fact that warrants on the State treasury are not cashed. They form, and have formed for many years, a part of the commodities for daily sale in this city. The treasurer of the school board of Concordia must either have sold, or the school treasury would have been empty. The legislature has more than once, not only recognized the fact that these particular warrants were the subject of barter, but made an enactment the special object of which was to enhance their market value. All warrants were to be received in payment of arrear taxes, sess. acts 1871, p. 196, and free school warrants should be received in payment of current taxes. Sess. acts 1872, p. 55. Warrants had become so large a part of the State debt, and their sale or transfer had become so universal, that they were put on the same footing as bonds in the Funding Act. Sess. Acts 1874, p. 39.

To prevent misapprehension we may say that we are not treating these warrants as negotiable paper in the commercial sense. It is their transferable quality—their alienability by sale and delivery—we are considering. Dillon, treating of municipal warrants, says;—Such instruments, issued by municipal and public corporations, are generally treated as negotiable in the sense of being transferable by delivery, and

in most of the States the transferee or holder may enforce payment by suit or by mandamus in his own name. Munic. Corp. § 406. We have seen that the transferability of State warrants has been recognized by the legislation of this State—that the transfer of them is of daily occurrence—that even as Dillon says municipal warrants are “vouchers, or necessary instruments for carrying on the machinery of municipal administration, and for anticipating the collection of taxes,” so our State warrants have become the sole means or instruments for carrying on the machinery of every department of the State administration. The school warrants are like others in this respect. They cannot be regarded as stamped with the attributes of inalienability, as are the bonds of the school fund, for the latter are consecrated to a perpetual use, ‘never to be diverted to any other purpose,’ while the former represent the produce of that sacred fund which is required to be annually spent in the ‘maintenance and support of public schools.’

In 1877 the plaintiff brought suit against David Young and the sureties on his bonds as treasurer, and this suit is now pleaded as an estoppel. The allegations of that petition are that Young became treasurer of the Concordia school board in 1870 and continued therein until 1877, having executed four bonds with sureties during the intervening years, all of which are set forth—that during his term of office he drew from the State treasury over sixty thousand dollars of current, and free school fund, and that he paid out only a fraction over twenty-seven thousand dollars thereof—that Young has made divers sales of his property (six being enumerated) with the view of eluding the payment of his defalcation, all of which are null, simulated, and in fraud of plaintiff's rights which had been secured by timely recording of these several bonds—and thereupon judgment is prayed against Young for the residue of the fund in his hands, and against the securities for such sums as they were respectively bound for.

The sum alleged to have been received by him in that suit includes the sum for which judgment is prayed against Hernandez in this suit. The allegations of the plaintiff in that suit affirm the collection by its treasurer of the same warrants, for the collection of which the defendant is sued in this. The liability of Young, and the sureties on his official bonds, is founded upon his collection of the warrants and his failure to account for their proceeds. It is indisputable that Young, as treasurer, had the right to collect. This petition charges that he did collect, and such averment estops the plaintiff from now claiming that Hernandez collected, and is responsible therefor.

In what capacity did the defendant collect? The present suit does not charge that he was the agent or mandatary of the plaintiff, nor was such the fact. He was neither its officer nor employee, nor did he

Board of School Directors of Concordia Parish vs. Hernandez.

assume to transact its business, either by its authorization or of his own mere volition. He had no connection with the plaintiff. He treated with one of its officers and bought a saleable commodity from him, and the plaintiff had the misfortune to have an unworthy officer who consumed or withheld a large part of its funds. Which of the two should suffer?

An interesting discussion was had at bar, and in the briefs, upon the nature or kind of obligation imposed upon, or assumed by the defendant in the act of collection of these warrants—whether the source of the obligation (admitting that there was one) arose from a contract, quasi-contract, offence or quasi-offence. This was necessary in the presentation of the case, in the event it should become necessary to determine in what length of time the present action should be prescribed. But it has become unnecessary for us to pursue the subject, since it is manifest from what we have already said that the plaintiff must fail in its action from other causes.

The judgment of the lower court is affirmed with costs.

Justice SPENCER recused himself, and took no part in the decision of this cause.

DEBLANC, J. I concur in the foregoing decree and rest my concurrence on the second ground discussed in the opinion read by the Chief Justice.

Rehearing refused.

No. 7324.

STATE EX REL. H. W. FAIRCHILD VS. TALBOT STILLMAN.

Judgments rendered by this court while holding one of its country terms only become final on the expiration of three judicial days from their rendition.

The last judicial day on which an application for a rehearing may be made does not expire at 6½ o'clock, a. m. merely because this court adjourned *sine die* at that hour on that day. The application is in time if filed at any time during that day.

APPPLICATION for a mandamus.

Frank P. Stubbs for relator.

Respondent in person.

The opinion of the court was delivered by

SPENCER, J. At its Monroe term, 1878, this court affirmed the judgment of the district court in favor of plaintiff in the suit of Fairchild vs. McEnery. Our opinion and decree were delivered July 20; the 21st was Sunday. The court sat on 22d, 23d, and 24th. The session on

State ex rel. Fairchild vs. Stillman.

24th commenced at 6, and ended 6½ o'clock, a. m., when the court adjourned *sine die*. At 9½ a. m. of 24th, the defendant, McEnery, filed a formal application for rehearing.

The relator, Fairchild, demands that the clerk send down to the court *a qua* our decree for execution, alleging its finality by reason of the application for rehearing being filed too late.

Two questions are presented:

1. At the country terms of this court, is any delay given by law for applications for rehearing?

2. If so, had that delay expired when the said application was filed?

The first question arises out of the fact that the original article 911 of the Code of Practice, granting three days delay, is omitted from the Revised Code of 1870; and what was once a mere amendment thereto, relative to cases in New Orleans, has been substituted therefor. It is contended that therefore there is now no law granting delay for rehearings except in cases tried in New Orleans.

We think the omission the result of inadvertency or carelessness; and that the existence of the right sufficiently results from other provisions of the Code. Thus article 913 provides that "while the court is deliberating on this application (for rehearing), the *three days allowed for rendering a judgment final do not run*." Here is a clear enunciation that our judgments do not become final until after the lapse of three days. We gather from other provisions of the Code in analogous cases that these three days are *judicial days*. See arts. 911 and 558, C. P.

The second question is, must the 24th July, as a *judicial day*, be considered as having expired at 6½ o'clock a. m., the hour of the court's adjournment? We think not; an application filed at any time on that day would have been clearly sufficient and in time had the court met again on the 25th. Why should there be any difference in the cases of an adjournment to the next day and one *sine die*? In either case the party is entitled to three judicial days, but only three. If relator's position be correct, the application would be too late in either case, if filed after the hour of adjournment. It is not now the practice to require applications for rehearing to be filed *in open court*. We therefore hold that the defendant had the whole of the third day to apply, and did so in time. The mandamus is refused at costs of relator.

DISSENTING OPINION.

MANNING, C. J. In my opinion the judgment became final upon its rendition. By the Code of Practice, as it was before 1857, *all judgments* of this court became final after three judicial days, art. 911. In that

State ex rel. Fairchild vs. Stillman.

year, this article was amended by excepting from this rule nine designated parishes, of which Ouachita is not one, and in those, appeals were not to become final until the lapse of six days. Sess. Acts 1857, p. 184.

In the following year, it was enacted that all judgments of this court, rendered at New Orleans, should become final only after the lapse of six days. Sess. Acts 1858, p. 65. By the law as thus amended, appeals decided at New Orleans became final after six days, and those decided elsewhere after three days. But in the revisals of 1870, art. 911 provided for appeals decided here, giving six days before they became final and wholly omitted any provision for appeals at the country terms. This omission is so pointed, considering the amendatory acts of 1857 and 1858, that it must have been designed. And that it was an omission of significance and authority, and was so considered, is apparent from the fact that the legislature at its recent session amended art. 911 of the Code of Practice by providing that appeals rendered by this court "at other points where the court may be holden" beside New Orleans, shall be final only after three judicial days from rendering them. This Act was promulgated only two days ago. Official Journal of Feb. 8. Sess. Acts 1879, p. 33.

The judgments of this Court are final when they are pronounced unless the law otherwise specially orders. The Revised Code of Practice provided that appeals decided here should not become final until after six days, and made no provision for any delay as to judgments upon any other appeals. Therefore this appeal, decided at Ouachita last year, was final without any delay.

No. 5570.

B. F. CHARPAUX AND O. VALETTE VS. C. C. BELLOCQ, WIFE OF P. A. GIBERT.

Where a surviving wife sells a parcel of community property owned in indivision by herself and her minor children, and the sale is subsequently ratified by the children after they attain majority, or while they are minors, by a decree of court on the advice of a family meeting, such ratification, even though made after the institution of a suit by the vendee of the property to annul the sale, will cure any defect in the sale arising out of the wife's want of power to sell when that defect is set forth in the act of conveyance to the vendee, and he consents in the act, that the defect of title may be subsequently cured and the sale thereupon perfected.

The failure of a vendor to perform a condition of the sale is a passive breach of contract, and before an action to annul because of such breach can be maintained, the vendor must be put in default. An offer to annul made by the vendee does not amount to a default.

Charpoux and O. Valette vs. Bellocq.

A PPEAL from the Fourth District Court, parish of Orleans. *Lynch, J.*

Lacey & Butler for plaintiffs and appellees.

A. & W. Voorhies for defendant and appellant.

The opinion of the court was delivered by

WHITE, J. The plaintiffs, having bought from defendant a piece of real-estate in the parish of St. Tammany by act of sale passed before E. G. Gottschalk, notary public, on the 14th of June, 1866, instituted on the 25th of March, 1872, the present suit, in which they prayed that the sale made to them by the defendant be decreed to be null and void, that she be ordered to receive back the property by her sold them. They asked, in addition, the repayment of the cash price paid, and for a judgment for the value of the improvements put by them on the property. The cause of action upon which this prayer was founded is stated as follows:

1. The non-compliance by plaintiff with an obligation assumed by her to settle a tacit mortgage in favor of certain minors said to rest on the property sold, at the date of sale.

2. The fact that the defendant was not the owner of the property sold at the time of sale, rendering the sale therefore absolutely null under C. C. 2452.

The defendant resists on the following grounds:

First. That the mortgage complained of was no longer binding on the property sold, because of its not having been registered under the act of 1870. That even if binding the plaintiffs had retained under the terms of the act of sale a sum adequate to pay the mortgage and therefore could not complain of its existence.

Second. That the want of title complained of was as follows: the property sold to them by defendant was acquired by her from Mrs. Odile Derbes, widow of John Baptist Bellocq, and had belonged to the community existing between them, had passed at the date of the death of Bellocq to his surviving widow, as owner of one-half, and to his five children as owners of the other half. That if at the time of sale to her by Mrs. Derbes or at the date of her sale to plaintiffs there was any nullity or want of title it had been cured by a proper ratification made by the heirs of Derbes, which ratification completely destroyed plaintiffs' right of action and deprived them of all just cause of complaint.

Third. That if there was a want of title at the date of her sale, it was known to the purchaser, one of the plaintiffs, and he can not therefore complain.

Fourth. That since the date of sale to plaintiff he had been either through himself or his co-plaintiff, to whom he had sold, in undisturbed possession of the property, without threat of eviction, and therefore

could not be heard to attack the title under which he held for the purpose of relieving himself from the obligations of a contract legally entered into.

The evidence in the record both as to the title and claimed ratification is documentary, and the proof ministered by it is as follows :

On the 29th of September, 1860, Mrs. Derbes sold to defendant the property in controversy. At the time of the sale the property was only owned by her in indivision with her children, having formed a part of the community which had existed between herself and her deceased husband. On the 14th of June, 1866, the defendant transferred the property thus acquired to Charpoux, one of the plaintiffs, the act of sale containing the following stipulation : "and it is further understood and agreed that the two notes thus subscribed by him, said Charpoux, shall remain in his possession until the said Mrs. Gibert shall have complied with all the stipulations herein contained concerning the furnishing of a good and valid title to said property." On the 8th of April, 1867, Charpoux transferred this property to his co-plaintiff. There is no question as to the undisturbed possession of both since the sale, up to the institution of the present suit, on the 25th March, 1872, nearly six years after the date of their acquisition. The facts as to the ratification are as follows : On the 13th of April, 1872, a few days after the institution of this suit, the major heirs of John Baptist Bellocq expressly, by act before Doriocourt, notary public, ratified and confirmed the sale made by their mother, Mrs. Derbes, to the present defendant. One of the heirs being a minor, a petition was presented to the Second District Court which stated that by some mistake in the original proceedings had to adjudicate the community property to the widow upon the death of her husband the property in controversy had been omitted or not adjudicated ; that in consequence of such omission and want of knowledge she had sold said undivided half along with her own ; that she was willing that the minor's share of the proceeds should be taken from the cash proceeds of sale, which sale exceeded the value of the property in the inventory of her husband's succession. She prayed a family meeting, which was ordered and held, and recommended the confirmation and ratification of the sale, the deliberations were homologated by the court, and authority given to pass the necessary act of ratification, which was accordingly done. Under this state of facts judgment was rendered by the lower court annulling the sale, and that judgment is now before us for review.

The counsel for plaintiff and appellee have waived in their brief the question of the right to rescind growing out of the alleged mortgage. Their position, as we look at it, is :

1. That the ratification tendered is not sufficient.

2. That even if sufficient, there being no title in their vendor at the time of their purchase, the sale was null under C. C. 2452. That any ratification made after the institution of their suit is inoperative, as their rights are to be tested by the state of things in existence at the date of their demand. We think none of these positions tenable.

1. The ratification is good; as to the major heirs, it certainly validated the title; as to the minor heir, it had the same effect. We deem it useless to enter into a discussion as to the nature of the nullity of the sale of a minor's property by private sale. Grant that such a nullity be one of *quasi* public order, it is established in the interests of the minor, and can be ratified by him when *sui juris*. This was not, however, a sale of minor's property; it was a sale of community property. The court and family meeting would have had the power to adjudicate by original act and the ratification did nothing more. Whatever dissidence may exist on the subject, the overwhelming weight of authority is in favor of the power of the court and family meeting to do by ratification that which they could do by original act. In fact, such is the textual provision of our Code. C. C. 1794; *Bank of Lafayette vs. Delery*, 2 A. 648; *Vaughan vs. Christine*, 3 A. 328; *Dunbar vs. Creditors*, 2 A. 727.

2. The ratification being binding, can the plaintiff be heard to escape his obligations by complaining of a nullity which is cured completely? His position is that his rights were fixed by his petition, that the nullity is absolute, and no ratification tendered him after his suit is of any effect. Let us see. Grant for the purposes of examination that a vendee may be heard to invoke the nullity of a sale made in violation of C. C. 2452, even although not threatened with eviction. Grant that the nullity of the sale of the property of another is so radical that the vendee by a simple act of volition may repudiate it, may refuse to accept a ratification tendered after judicial demand. Are the plaintiffs within the rule? Is the sale in controversy, the sale of the property of another, within the prohibition of C. C. 2452?

In saying that the sale of the property of another is null, the authors of the Code Napoleon, art. 1599, whence C. C. 2452 is drawn, departed from the ancient law. The departure, however, was rendered necessary in consequence of a fundamental difference between the theory of sales as embraced in the Roman law and that adopted in the Code Napoleon, and our own Code, the Roman law sale importing simply possession, while that of the Code Napoleon and our own imports not only the transmission of possession but also that of ownership or title. These reasons were the operating cause of the insertion of the provision of article 1599 in the Code Napoleon, whence they have passed into our own, and were expressed by the compilers who framed and lawgivers who adopted the Code Napoleon.

Pardess. Exposé des Motifs, No. 19; Loaré, Title 7, p. 73; Grenier, Discours No. 15; Loaré, Title 7, p. 109; Faure, Rapport au Tribunal, No. 18; Loaré, Title 7, p. 91.

Does a sale in terms purporting not to transfer title fall within the inhibition of art. C. C. 2452? We think not, because if that article declares the nullity of the sale of the property of another person for the reason that title is supposed to flow from the act, its provisions manifestly do not apply to a sale, *where by agreement between the parties the title is not conveyed but the obligation to procure it is simply assumed by the vendor*. Such is the opinion of the French juriconsults: "Je conviens avec vous que je vous vends tel immeuble appartenant à votre voisin, et je m'oblige à l'acquérir, à vous le livrer. Est-ce-la vente de la chose d'autrui? Non, à vrai dire, ce n'est pas une vente; le débiteur s'engage à acquérir d'abord l'immeuble, ce qui est une obligation de faire. C'est seulement quand il aura acquis l'immeuble que la vente s'accomplira. De même, si je me porte fort que Pierre vous vendra sa maison pour tel prix, la convention est valable; sur ce point il n'y a pas de doute, puisque nous avons une texte: l'article 1120; ce n'est pas la vente de la chose d'autrui par l'excellente raison que ce n'est pas une vente; c'est une obligation de faire, sanctionnée pas des dommages-intérêts. Il faudrait encore regarder comme valable la convention formulée en ces termes: "Je vous vends la maison de Pierre pour tel prix." Ce n'est pas une vente; c'est un engagement ou de me procurer cette maison pour vous la livrer, ou de faire que Pierre vous la livre. La formule diffère, mais la convention est identique." Laurent, v. 24, p. 115.

Zachariæ says: "D'un autre côté, cette disposition est inapplicable à la vente de la chose d'autrui, contractée sous la condition suspensive de l'acquisition de cette chose par le vendeur, ainsi qu'à celle lors de laquelle ce dernier s'est porté fort pour la véritable propriétaire."

Troplong says: "On peut aussi vendre la chose d'autrui en se portant fort de faire ratifier la vente par le propriétaire."

Troplong de La Vente, vol. 1, p. 318, No. 234.

Duranton, t. 16, No. 179.

The jurisprudence of France inculcates the same principle. DePreignan c Hue & Fortanier, Cassation 8th January, 1866. Journal du Palais for 1866, p. 258: and so teach the courts of Belgium upon an identical provision of law. Laurent, vol. 4, p. 118.

Does the sale in this case come within this doctrine? It manifestly does. The terms of the act placed upon the vendor the obligation of procuring title, and these terms read by the allegations of the petition make it more than clear that the act did not purport to transmit title, but that the procurement of title was simply a condition of the sale. The averment is "that in and by said act of sale it was stipulated

 Charpaux and O. Valette vs. Bellocq.

and agreed * * * * until certain defects in the title were cured the cash payment of one thousand dollars should not be exigible."

Again: "that on account of the unreasonable delay and continued failure on the part of defendant to perfect the title," etc., etc. The sale then is not stricken with the nullity provided under C. C. 2452. It did not purport *per se* to transmit title. The procurement of title being one of the obligations of the contract, of course legal rights resulted from it. Whatever view may be taken, the obligation was either the obligation of doing or a condition. If of doing, then inaction not being an active violation default was prerequisite. C. C. 1931, 1932, 1933. We do not consider that the offer to annul was such default. If a condition, of course under the implied resolutive condition, the contract being commutative, it could be rescinded in the event of non-performance; but rescission under the implied resolutive condition is within our sound discretion as to time. C. C. 2047. We see no reason to rescind a sale on the ground of non-compliance with the condition thereof when a full performance is tendered in answer to the suit.

The judgment of the lower court was in favor of the plaintiff. It is reversed; and, proceeding to render such judgment as should have been rendered by the lower court, it is ordered, adjudged, and decreed that there be judgment against the plaintiff and in favor of the defendant, dismissing plaintiffs' suit at their cost; all costs of the lower court prior to the filing of defendant's answer to be paid by defendant.

Rehearing refused.

No. 4389.

SARA STIRLING ET AL. VS. SARA P. LAWBRASON.

When it appears that an executrix who had exercised the functions of her office under the exceptional circumstances, and at the actual theatre of a civil war, performed her duties with discretion and honesty, she can not be held responsible in law for losses that were inevitable as a result of war.

A PPEAL from the Sixth District Court, parish of Orleans. *Cooley, J.*

Edward Phillips and Merrick, Race & Foster for plaintiffs and appellants.

John H. New and Percy Roberts for defendant and appellee.

The opinion of the court was delivered by

MANNING, C. J. James L. Stirling died in April 1860 in the parish of West Feliciana, leaving a wife, and mother and brothers and sisters surviving, but no children. By his will, which was duly probated, he gave all of his personal property to his wife, except three notes of

Stirling et al. vs. Lawrason.

David Barrow for \$7,500 each, and the money in the hands of his commission merchant, which he directed should be disposed of as the law directs. His widow was testamentary executrix, who qualified, administered the estate, and in February 1862 filed her final account, which was homologated. That account shews the sum of \$12,625.31 for distribution among the heirs, who are the present plaintiffs, and for its recovery this suit is brought.

In that account enter the three Barrow notes, not then collected, but charged as of the sum which the principal and interest then aggregated, and they were the largest asset of the estate—amounting to nearly twenty-five thousand dollars. In June 1863 Barrow offered to pay—rather demanded to pay them. There was but one currency in use then, i. e. the Treasury notes of the Confederate States. Mrs. Stirling objected to receiving payment in those notes. In her testimony she says she was prevailed on to receive it, and that the money or Treasury notes thus received were handed to Mr. Winter, who promised to invest them in foreign exchange, and if he could not succeed in doing that, he would invest them to the best of his ability. She thought he had invested them in cotton. What Winter did with them no one knows. The money was utterly lost to the estate. The question now is, shall the executrix be held responsible for the sum received, or acknowledged in her account to have been received by her?

War prevailed then. The parish where Mrs. Stirling lived was open to the incursion of the military forces then invading the country, and was in their actual possession. "After the federal forces had taken possession of the country, says Mrs. Stirling, I had great trouble in hiding this Confederate money." She kept it until her apprehensions for its safety became so great, that she determined to keep it no longer, and disposed of it as already narrated. "Every day and every night, says the witness Lewis, squads of Federal soldiers were about, carrying off every thing they could lay their hands on." Not a human being was on the place except three ladies. The slaves were gone. If she had not received the Confederate money when Barrow offered to pay his notes with it, she would have subjected herself to suspicion of disaffection or charge of treason, and might have got into serious trouble. If the Confederate money, or any other sort of money, had been found in her house by the soldiers, she would quickly have been relieved of all anxiety about its safety. There was no bank in the parish in which to deposit it. What could she do but give it to some friend to do with it as best he could?

The legal question is, must an executrix be held to an absolute and unqualified responsibility for doing what she could not avoid doing, under circumstances when she could not exercise any discretion, and

Stirling et al. vs. Lawrason.

when she was doing what appeared to be the best thing to be done at that moment with her surroundings. We think not.

The paper that is called an account and which was filed and homologated in 1862 must have been a provisional tableau, for it was not until 1869 that the executrix, having shewn that she had paid all the debts, was finally discharged. This suit was instituted in 1872, more than ten years after the tableau was filed, from which time the plaintiffs claim interest, and the plea of prescription is filed, but we do not think it necessary to pass on it.

We prefer to rest our decision upon the broad ground, that under the exceptional circumstances in which fiduciaries were placed by the existence of war, when localities were possessed and ravaged in turn by contending armies, and when under these difficult circumstances they acted with discretion, and honesty, they cannot be held responsible in law for losses which were inevitable as a result of the war.

The judgment of the lower court was rendered upon the verdict of a jury, and was for the defendant. It is correct and is affirmed.

Rehearing refused.

No. 7325.

H. B. CLAFLIN & Co. vs. LISSO & SCHEEN.

The filing of an answer in this court by the appellee, in which he does not reserve his right to dismiss the appeal, amounts to an abandonment of his previous motion to dismiss.

A judge has no authority to release an attachment of property claimed to be exempt from seizure on the *ex parte* application of the defendant. The plaintiff must be duly notified of the application, and given an opportunity to be heard.

APPEAL from the Seventeenth Judicial District Court, parish of Red River. *Broughton, J.*

T. T. & A. D. Land and Kennard, Howe & Prentiss for plaintiffs and appellants.

J. F. Pierson, W. M. Levy, L. B. Watkins, and Egan & Ogden for defendants and appellees.

ON MOTION TO DISMISS.

The opinion of the court was delivered by

SPENCER, J. Defendants and appellees filed motion to dismiss appeal, and on same day filed their answer, praying that the judgments be affirmed. In this answer there is no reservation of their right of dismissal. The motion to dismiss must be considered as abandoned and waived by the answer. 27 A. 284; 8 R. 168; 3 R. 169; 6 N. S. 531.

ON THE MERITS.

Clafin & Co. sued out an attachment against defendants for a sum of nearly \$10,000 on allegations that defendants were fraudulently disposing of their effects.

The order of attachment was, on proper affidavit of the absence of the district judge, granted by the parish judge. There being no sheriff or coroner in the parish, a special officer was appointed and sworn to execute the writ. Under this writ, the officers attached certain lands, also the remains of a stock of goods, and "two safes and the contents therein" in defendants' store. This seizure was made December 6, 1878.

On same day, December 6, the defendants applied for and obtained an order from the parish judge, acting for the absent district judge, directing the officer to release and deliver to defendants the two safes which had been attached, on the ground that they were exempt from seizure, as being implements or tools necessary to their occupation, etc. This order was obtained without any notice whatever to the plaintiffs, and was granted at chambers. Its effect was to release from attachment the "two safes and their contents," the safes being at the time of seizure locked and the keys and combination in the possession of defendants.

On the next day, December 7, plaintiffs applied to the said parish judge to rescind said order of release, and maintained the attachment at least of the money, notes, etc., contained in said safes. This application was rejected by order, Dec. 7.

Plaintiffs on same day applied for and took a suspensive appeal from both orders, to wit: that of Dec. 6, releasing the property, and that of Dec 7, refusing to rescind the order of release.

Plaintiffs have assigned numerous errors, of which it will not be necessary to notice all.

Waiving the questions whether or not the parish judge has under art. 123 C. P. the power to grant in a cause pending in the district court an order releasing without bond property attached, and waiving the question whether such order can be rendered *at chambers*, we proceed to consider whether such an order can be granted by any judge, at any time, without notice to the plaintiff?

We do not hesitate to answer this question in the negative.

Such a practice is so repugnant to common sense, and so flagrantly violative of common justice, as to require no argument to condemn it. What would become of the rights of seizing creditors, if their debtor be allowed to go to the judge in secret, and procure from him an order releasing property seized? If he can do so upon one pretext, he can upon another. In this case, the pretext was that the safes were exempt

 Claflin & Co. vs. Lisso & Scheen.

from seizure, and under guise thereof "the contents" were also released, though plaintiffs alleged and offered to prove on their motion to rescind that the safes contained large sums of money and securities.

The question as to whether a given thing is or is not exempt, under art. 644 C. P., is one of fact and law, and is to be determined after hearing the parties.

We are cited to arts. 652 and 653 C. P., relative to the reduction of excessive seizures under *fi. fa.* as analogous, and as permitting a seizure to be released without notice to the creditor. The articles cited do not sustain the position. To take the proceeding provided for in those articles without giving the creditor an opportunity to be heard, would be as arbitrary and illegal as the proceeding taken in this case. The property seized might amount in value to many times the creditor's claim, and yet on account of previous incumbrances or seizures be wholly insufficient to pay the debt for which it is seized. Because the articles do not specially provide for notifying the creditor, is no reason for holding such notice unnecessary. Every principle of law and judicial procedure as well as every consideration of common justice requires such notice.

It is therefore ordered, adjudged, and decreed that the orders of Dec. 6 and 7, 1878, appealed from, be annulled, avoided, and reversed; and it is now ordered that the attachment sued out by plaintiffs be re-instated and maintained upon the said safes and their contents until released by due course of law; and that defendants pay the costs of both courts.

 No. 7269.

SUCCESSION OF T. GOLLAIN.

It is the duty of an administrator to set forth in his final account and tableau of distribution a detailed bill of the clerk's costs.

The costs of holding a family meeting to appoint a tutor are not chargeable to the succession, if the minors have means of their own, but to the minors.

The administrator is not entitled to his commissions on the proceeds of property sold under executory process of an ordinary court, and which did not come into his hands for administration.

An objection that the claims of the physician and nurse in the last illness were not recorded, and therefore can not be ranked as privileged debts, can not be raised for the first time in this court. It must have been pleaded in the lower court.

The administrator is not liable for any losses to the succession caused by any illegal acts of the sheriff in the sale of succession property under the executory process of an ordinary court.

A PPEAL from the Second District Court, parish of Orleans. *Tissot, J.*

O. Drouet and A. J. Villeré for administrator and appellee.

Henry Denis for Walter Pugh, opponent and appellant.

The opinion of the court was delivered by

SPENCER, J. This appeal is taken from a judgment of the court of probates homologating the final account and tableau of distribution presented by the administrator of the insolvent succession of Theophile Gollain.

The grounds of opposition to said account and tableau of distribution urged by appellant are as follows, to wit :

First.—That the clerk's costs, the notary's fees, and the cost for advertising the sale of real estate are improperly charged.

Secondly.—That the administrator's commission is improperly charged on the sale of property sold by executory process *dehors* the succession.

Thirdly.—That the claims of the physician and the nurse for services in the last illness are improperly charged.

Fourthly.—That the administrator is responsible for the loss of the sum of three hundred dollars, resulting from his neglect and refusal to compel a certain solvent person to comply with his bid at the sheriff's sale of some real estate of the succession.

1. We find in the account items as follows :

"Clerk's costs paid Pace, clerk, \$50.

"Clerk's costs paid Herbert, clerk, \$42 50.

"Notary fees for family meeting, \$10."

We find no detailed bills of these clerk's costs in the record—either by way of proof or voucher. It seems there was considerable contest for administration, several persons claiming it. Appellant contends that the costs of these contests, so far as relates to the unsuccessful applicants, are not chargeable to the estate, and in this he is clearly right. But on the record as presented we can not determine what part of these costs are properly chargeable. It was the duty of the administrator to have filed detailed bills, and we shall remand the case, to allow the account to be revised in this regard.

The costs of holding a family meeting to appoint a tutor are not chargeable to the succession, if the minors have means of their own. In this case they are allowed the homestead of \$1000, and these costs should be deducted from that amount.

2. The administrator is not entitled to his commissions on the proceeds of the sale of property sold under executory process of the ordinary courts, and which did not come into his hands for administration and distribution. 10 A. 258.

3. The claims of the physician and nurse in last illness were opposed on the ground that the services were not rendered. They are sufficiently

Succession of Gollain.

proven; and the objection, made in this court and in the brief of counsel only, that they were not recorded as privileges, was not pleaded and can not be now noticed. *Non constat* that if this defense and objection had been made below registry would not have been proven. The opposition to these items was properly overruled.

4. The sale referred to was not one made by the administrator or by the probate court. It was an executory proceeding in the Fifth District Court, and the sale was made by the sheriff, who was not under the control of the administrator. Nor is the administrator responsible for the sheriff's illegal acts, if illegal they were, upon which we express no opinion. This ground of opposition was properly overruled.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be amended as follows: first, by rejecting the administrator's commissions on the proceeds of the property of the succession sold under executory process at the suit of the mortgage creditors; 2d, by the item of \$10 notary's fees for holding family meeting being charged to and upon the minors' claim of homestead; and, 3d, by remanding the case as to the two said items of clerk's costs, to ascertain what portion thereof is properly chargeable to the succession under the views above expressed.

It is further ordered that in all other respects said judgment be affirmed, and that the costs of appeal be paid by appellee.

No. 7181.

SUN MUTUAL INSURANCE COMPANY VS. BOARD OF LIQUIDATION. SECRETARY OF STATE AND AUDITOR, INTERVENORS.

The sale of bonds constituting a part of the assets of the "free school fund," made in virtue of act No. 81 of 1872, was utterly null and void, and conferred no title on the purchaser, and no future assignee of the purchaser, who took the bonds in good faith, for value, and before their maturity, could acquire a title to them.

Bonds that are a part of the assets of the "free school fund" are consigned by law to the custody of the Secretary of State and Auditor of Public Accounts, and those officers have a right to claim their possession in whatever hands they may be found. And this right is not affected by the prescription of three years.

A PPEAL from the Fifth District Court, parish of Orleans. *Rogers, J.*

Leovy & Kruttschnitt for plaintiffs and appellees.

Jas. C. Egan, Assistant Attorney General, for intervenors and appellants.

The opinion of the court was delivered by

SPENCER, J. Plaintiffs brought this suit to compel the Board of

Sun Mutual Insurance Company vs. Board of Liquidation.

Liquidation to fund eleven bonds of \$1000 each of the series issued to the New Orleans, Jackson & Great Northern Railroad under act of 1853.

The State, the Auditor, and Secretary of State intervened, alleging that said bonds belonged to and constituted part of the assets of the "Free School Fund," and pray that the same be delivered to them, the said Auditor and Secretary being the lawful custodians thereof.

The court below ordered the Board to fund the bonds, and rejected the demands of intervenors, as in case of nonsuit.

There is no serious contest over the legality of the bonds as lawful debts of the State. The contest is between the plaintiffs and the intervenors.

It appears and is admitted that these bonds did belong to and constitute part of the assets of the "Free School Fund," organized and created by acts No. 321 of 1855, and No. 182 of 1857, pursuant to the act of Congress of February 15, 1843, 5th Statute at Large, p. 600.

It also appears that these bonds were sold, in pursuance of act 81 of 1872.

That they were acquired by plaintiffs before maturity, from persons who bought them at said sale. That plaintiffs are all citizens of Louisiana, and had no other notice of the fact that these bonds belonged to the "Free School Fund" than would result from their presumed knowledge of the acts and proceedings of the State and its officials.

In "State ex rel. Durant vs. Board of Liquidation," 29 A. 77, we had occasion to consider the legality and constitutionality of the act 81 of 1872, abolishing the "Free School Fund," transferring its assets to the "Redemption of Floating Debt Fund," and directing their sale for the benefit of said last named fund. We there held that said act 81 was an act of spoliation—violative of the said act of Congress, and of the acts of 1855 and 1857, carrying the same into effect, and of Art. 139 of the constitution of 1868, and that the sales of the bonds of said school fund under said act 81 were null and void and conferred no title on the purchaser. We adhere to that view, and refer to that case as supplementary to our opinion in this. These sales were made in violation of prohibitory laws.

The Free School Fund having acquired said bonds, they became under the said act of Congress, and the acts of the Legislature of 1855 and 1857, carrying said act of Congress into effect, and under the constitution of 1868 affirming said acts of 1855 and 1857, *inviolably appropriated* to the support of public schools, "and for no other use or purpose whatsoever." These laws to all intents and purposes took said bonds out of commerce. They were placed in the special and joint custody of the Secretary of State and Treasurer, who were required to execute duplicate receipts therefor, and "to be and remain a perpetual fund" "inviolably appropriated" to support of public schools.

Sun Mutual Insurance Company vs. Board of Liquidation.

We agree with the Assistant Attorney General that they ceased to be negotiable by virtue of these positive declarations of legislative will, and that the usages and laws of commerce relative to negotiable paper are superseded by these positive enactments, and are inapplicable to the case. We follow the commercial law only when it does not conflict with statute laws of the State, but no further. 21 A. 568. It is within the power of the State to destroy the negotiability of all paper, and to withdraw from commerce such things as it may deem proper.

Nor are we prepared to say that the purchasers of these bonds were guilty of no *laches*. They can not plead ignorance of the laws of the United States nor of the constitution, laws, and public acts of the State. They therefore knew that sales of the assets of the school fund under act 81 of 1872 were illegal. They knew what bonds belonged to that fund, for they were exhibited in reports of the proper public officers. They knew that these bonds had been illegally sold to pay the floating debt; for the sale thereof was duly advertised for thirty days in the official journal and *due return* made and officially published.

Ordinary diligence and investigation of facts perfectly accessible and known or presumed to be known by all men would have protected plaintiffs.

The views we have taken and expressed herein render it manifest that the three years prescription pleaded by plaintiffs to intervenors' demands can not be maintained. The intervenors do not ask any decree against the Board to fund said bonds, and we will therefore make no order in that regard.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be avoided and reversed, and, proceeding to render such judgment as should have been rendered, it is ordered, adjudged, and decreed that plaintiffs' demands be rejected, and that the intervenors be and are declared entitled to the possession and custody of the bonds sued on in this case, which are decreed to belong to the Free School Fund.

It is further ordered that said bonds be delivered to intervenors; and that plaintiffs pay costs of both courts.

ON APPLICATION FOR REHEARING.

The plaintiffs' counsel ask a rehearing, on the ground, among others, that "there is no evidence in the record to show that bonds 716, 717, and 718, herein sued on, ever did belong to the Free School Fund."

This suit was brought on eleven bonds, and a list giving the numbers of all the bonds held by the school fund was filed in evidence,

Sun Mutual Insurance Company vs. Board of Liquidation.

these numbers being in many instances stated as *from one number to another inclusive*.

The plaintiffs' counsel filed an elaborate brief, and argued the case throughout upon the hypothesis that all the bonds in suit belonged to that fund, nowhere intimating that in that labyrinth of numbers three of the bonds sued upon were not embraced.

This court has labor enough, and its power is sufficiently taxed, to decide the issues presented and pressed by counsel, without exploring records to discover defenses and points not urged.

If the counsel had in any way called our attention to the fact now urged—indeed, if they had not misled us by an argument which seemed to admit that all the bonds sued upon were of those held by the school fund, we should not have made the oversight complained of. We will grant the rehearing only for the purpose of correcting our decree in regard to those three bonds. We see no reason to change it in other respects.

The rehearing is granted.

ON REHEARING.

There is no evidence showing that the bonds sued on by one of the plaintiffs, J. E. Glenny, and numbered 716, 717, and 718, belonged to the Free School Fund.

It is therefore ordered, adjudged, and decreed that our former decree herein be so amended as to reject the claim of intervenors to the three bonds above named; and it is now ordered and decreed that as to said three bonds the judgment appealed from is affirmed, and that they be and are declared legal and valid debts of the State, issued in strict conformity to law and for a valid consideration, and not in violation of the constitution of this State or of the United States, and are as such entitled to be funded in consolidated bonds.

It is further ordered that as to said plaintiff, Glenny, he recover costs of the lower court and pay those of this appeal. That in all other respects our former decree remain undisturbed.

Mr. Justice WHITE took no part in the original, and takes none in this opinion.

 State vs. King.

No. 7296.

THE STATE VS. J. O. KING.

An information which charges that the accused stole "one mule valued at seventy dollars, the property of John M. DeFee," sufficiently describes the stolen property.

The granting of a continuance in a criminal case is within the sound discretion of the court.

A PPEAL from the Eleventh Judicial District Court, parish of Union.
Graham, J.

H. N. Ogden, Attorney General, for the State.

Rutland & Kilgore for defendant.

The opinion of the court was delivered by

WHITE, J. The defendant having been informed against for stealing a mule, and having been convicted and sentenced to hard labor for four years, appealed therefrom. The record contains no assignment of errors or bill of exceptions. A motion was made to quash the information on the ground of want of proper description. The description in the information is "one mule valued at seventy dollars, the property of John M. DeFee." The description was sufficient. *Archbold, Pomeroy's Notes*, vol. 2, p. 1160; *Gabriel vs. State*, 40th Ala. 357; *People vs. Littlefield*, 5th Cal. 355. An application for a continuance was made, which was overruled; no exception was taken to the refusal to grant the continuance asked. The matter was within the sound discretion of the district court, and as shown by the face of the application proper steps had not been taken to procure the attendance or testimony of the witnesses whose absence was made the basis of the asked-for continuance.

Judgment affirmed.

 No. 7182.

MRS. LOUISE DESTREHAN VS. POLICE JURY, PARISH OF JEFFERSON.

The lease of a building for a court-house made under the authority of an ordinance of the police jury of a parish is utterly invalid, unless means for paying the rent stipulated in the lease is provided for in the ordinance.

A PPEAL from the Second Judicial District Court, parish of Jefferson.
Pardee, J.

Cotton & Levy for plaintiff and appellee.

Josiah Fisk, District Attorney pro tem., and *Ellis & Ellis* for defendant and appellant.

The opinion of the court was delivered by

WHITE, J. On the 14th of April, 1874, plaintiff leased to the Police Jury, Right Bank, parish Jefferson, a certain portion of ground, with the

buildings thereon, for the term of five years, the stipulated rent being as follows: Five hundred dollars for the first year, one thousand for the second and third years, and twelve hundred dollars per annum for the fourth and fifth. The lease purports to have been made under two resolutions of the Police Jury, the one asking for proposals for leasing property to be used in establishing a court-house, the other accepting the proposal of plaintiff. The present suit, filed on the 14th Nov., 1877, is to enforce the lease thus made, to recover the sum of thirty-four hundred dollars (\$3400) rent due and to become due under the lease.

The Police Jury make the following defense:

First. That the buildings were used for a court-house and parish offices, and were therefore a common parochial expenditure, they owing only their *pro rata*, and the "Police Jury, Left Bank," the remainder.

Second. That the lease created a debt or expenditure without making provision for its payment, and is therefore null.

1. The view we have taken of the second defense renders an examination of the first unnecessary.

2. The lease was undoubtedly the creation of a debt, and we can find nothing, either in the resolutions calling for proposals and accepting that of plaintiff or in the lease itself, indicating in any way the making of provision for the debt thus created. The terms of the law are unambiguous: "The police juries of the several parishes and the constituted authorities of incorporated towns and cities in this State shall not hereafter have power to contract any debt or pecuniary liability, without providing in the ordinance creating the debt the means of paying the principal and interest of the debt so created." R. S. 2786.

This provision has been uniformly enforced. *Benham vs. Parish of Carroll*, 28 A. 343; *Smith vs. Parish of Madison*, 30 A. 461.

The case is sought to be removed from the operation of the statute by contending that under the second section of Act No. 71 of 1874 the Police Jury, Right Bank, were authorized to establish a court-house. But it is obvious that the mere delegation of a power does not delegate the right to the exercise of the power in violation of a general and mandatory law. To establish imports to establish according to law. It is an elementary canon of construction that a special does not repeal a general law unless irreconcilably inconsistent, and we see no possible inconsistency between the power to do and the obligation so to do in the manner pointed out by law, and this reasoning meets also the argument drawn from the general powers given to police juries to provide court-houses. R. S. 2746. The two provisions must be construed together. It is contended that the expense herein was necessary. Grant that it was; the mere necessary nature of the expenditure could not dispense from the necessary duty of providing according to law. The argument,

Destrehan vs. Police Jury, Parish of Jefferson.

if argument it be, that because the Police Jury occupied the premises they ought to be condemned, however equitable, would not justify us in disregarding the law. It more justly addresses itself to the conscience of the Police Jury to provoke under a *quantum meruit* legal provision for what they may so in conscience owe.

The judgment of the lower court was in favor of plaintiff. We think it erroneous. It is therefore reversed, and the suit of plaintiff dismissed at her cost.

ON APPLICATION FOR A REHEARING.

We have been urged to remand this case to afford the plaintiff an opportunity of showing that provision was duly made for the claim. Our original decree was only one of nonsuit, and if the facts claimed can be shown the plaintiff will be able in another action to make that sufficient proof, said to be in existence, but not in the record before us. However, we will grant the rehearing, for the purpose of correcting our decree in such a manner as to leave no possible room for doubt of its being any other than one of nonsuit.

ON REHEARING.

It is ordered that our former decree be so modified as to read as follows: The judgment of the lower court was in favor of plaintiff. We think it erroneous. It is therefore reversed, and the plaintiff's suit dismissed as in case of nonsuit at her cost.

No. 7396.

THE STATE VS. AMOS AVERY.

A witness who testifies to the confessions of one accused of crime is not required to swear to the precise words of the accused. It is enough that he testifies to the substance of what the accused said.

Whether the confessions of an accused were induced by threats or promises is a question of fact which this court can not review.

APPEAL from the Eighth Judicial District Court, parish of St. Landry. *Hudspeth, J.*

H. N. Ogden, Attorney General, for plaintiff and appellee.

Kenneth Baillio for defendant.

The opinion of the court was delivered by

SPENCER, J. The defendant was convicted of horse-stealing. He seeks to reverse the sentence on two grounds :

First. The witnesses who testified to the confessions of the accused stated, in effect, that they could not and would not undertake to swear to the precise words of the prisoner; but that they did remember the substance of his declarations. This was sufficient. To require more would be to effectually close the mouths of conscientious men when called on as witnesses to testify to such confessions.

Second. It was further objected that the confessions were not voluntary; but were the result of threats and promises. The judge states that the evidence satisfied him of the contrary. He was the proper judge of the weight and credibility of the testimony of the witnesses detailed in the bill of exceptions. Whether those confessions were or not induced by threats or promises was a question of fact which we can not review.

Judgment affirmed.

No. 7359.

WIDOW FIELDS, TUTRIX, VS. GAGNÉ AND WIFE.

The parish court is without jurisdiction of an action of revendication brought to recover property worth over \$500, and which was sold by the administrator of a succession no longer in existence.

A parish court has no jurisdiction of a suit brought to annul a judgment of a district court.

A PPEAL from the Parish Court of Terrebonne. *Sidney, J.*

Thomas L. Winder for plaintiff and appellant.

Lawrence F. Suthon for defendants and appellees.

The opinion of the court was delivered by

MARR, J. Joseph A. Gagné was administrator of the succession, and tutor of the minor children of Frank Gagné.

In the course of administration he provoked the sale of certain property belonging to the succession; and at this sale his wife, claiming to be separate in property by judgment of the district court, purchased a block of brick stores in the town of Houma, at the appraised value, \$3000. He also rendered accounts, provisional and final, which were homologated; and he was discharged from his office as administrator. Subsequently he filed his account as tutor, and resigned the tutorship; and Mrs. Fields became dative tutrix.

In her capacity as tutrix Mrs. Fields brought this suit in the parish court of Terrebonne against the former administrator and tutor and his wife, the objects of which are, as stated in the prayer of the petition, to obtain judgment annulling and setting aside the sale of the succes-

sion property to Mrs. Gagné: annulling and disregarding as absolutely null the judgment in favor of Mrs. Gagné against her husband decreeing a separation in property, and awarding her \$1200: annulling the several judgments homologating the different accounts rendered by Gagné as administrator and tutor, and the proceedings by which he in his capacity as tutor renounced, in behalf of the minors, the succession of their father, and the community which existed between their father and mother; and to compel him to render a full and complete account, etc.

Both defendants excepted; but as this appeal is from the judgment maintaining the exception taken by the wife, and dismissing the suit as to her, and brings up for review nothing but that judgment, it will not be necessary to consider that part of the case and pleadings having reference to the husband and his gestion as administrator and tutor. The views which we entertain require us to pass upon but one of the several grounds of exception relied upon by Mrs. Gagné; and that is the want of jurisdiction by the parish court:

1. To annul the sale of the property in question, because the value exceeds \$500;

2. To annul the judgment of separation, because it was not rendered in the parish court; and because the amount involved exceeds \$500.

FIRST. The nullity of the sale is not demanded by reason of any alleged defect in the order of sale; but because of the alleged nullity of the judgment of separation, and the consequent continued existence of the community; and the incapacity of the wife, presumed to be merely a person interposed, to purchase property of a succession, at a probate sale, provoked by her husband, who was administrator. The object of the demand, so far as it relates to Mrs. Gagné, is to recover the property. It is an action of revendication, as to her, involving purely a question of title to real estate, the value of which greatly exceeds \$500. Such a demand is in no sense a probate case. If the succession of Frank Gagné were still open and in course of administration, the administrator could not maintain an action in the parish court to recover this property of Mrs. Gagné, because such a suit is of ordinary civil jurisdiction; and the value is in excess of the limit of civil jurisdiction conferred upon that court by the constitution; art. 87. When Joseph A. Gagné filed his final account, and was discharged as administrator, the succession was closed, and the heirs went into possession through him in his capacity as tutor. When he resigned, and Mrs. Fields was appointed tutrix in his stead, she was not the administratrix; she was the legal representative of the minors; and any demand against them or in their behalf, exceeding in amount \$500, would be cognizable only in the district court.

Fields vs. Gagne and Wife.

SECOND. If the judgment of separation was an absolute nullity, it might not be necessary in order to revendicate property, the title to which depended upon the validity of that judgment, to demand formally by suit the nullity of that judgment; but the prayer in this case is: "That there be judgment annulling and disregarding as absolutely null the judgment of separation of property," etc. The parish court was not asked, in a collateral proceeding, to disregard a judgment set up as a muniment of title, because of its absolute nullity; but to render a judgment annulling it. This the parish court had no power or jurisdiction to do, because that judgment was rendered in the district court, and a judgment annulling it, in a suit formally demanding the nullity, could only be obtained in that court. Besides, that judgment decreed not merely the dissolution of the community, the separation of property, and the right of Mrs. Gagné to administer her separate property, but also that she recover of her husband the sum of \$1229; a pecuniary value of which the parish court could not take cognizance.

The judgment appealed from is therefore affirmed with costs.

7383.

VIRGINIA THOMAS VS. J. J. DUNDAS.

A lessor may obtain the writ of provisional seizure, on making the proper affidavit for rents not yet due and exigible.

On trial of the motion to set aside a writ of provisional seizure, evidence is admissible to show that the affidavit on which the writ issued is false. And when such evidence is introduced the plaintiff must support his affidavit by proof.

The facts giving rise to that "reasonable apprehension" in a lessor that justifies him in issuing a writ of provisional seizure, need not be convincing enough to support a conviction on a criminal charge. It is sufficient that they are of such a character as to rebut the presumption of malice, or wantonness in suing out the writ.

Seizing the movables of a lessee of a plantation under a provisional seizure before the end of the year for which the place was leased, will not prevent the lessor from recovering rent for the whole year, when it appears that the possession of the land by the lessee was not divested by the seizure.

A PPEAL from the Thirteenth Judicial District Court, parish of Madison. *Hough, J.*

Farrar & Spencer for plaintiff and appellant.

H. P. Wells for defendant and appellee.

The opinion of the court was delivered by

MANNING, C. J. The plaintiff, in her individual capacity and as tutrix to her minor children, leased a plantation in Madison parish to the defendant for three years, commencing with 1876, the annual rental being five

thousand dollars, payable in three equal instalments on the 15th. of October, November, and December of each year. One of the stipulations of the lease was that a failure to pay any instalment of the price should operate its dissolution *ipso facto*. The defendant paid the October and November instalments of 1876, not at maturity but without long delay, and did not pay the December instalment. He continued in the possession and cultivation of the plantation.

On Sept. 17, 1877, this suit was instituted wherein it is alleged that the December instalment of the previous year was unpaid, though long since due, and that the defendant is further indebted to the plaintiff in the sum of five thousand dollars for the rent of 1877, to become due in the three following months as above set forth, and after making the usual allegation under oath, prayed a writ of provisional seizure of all the property that was subject to the lessor's privilege. The writ issued, the property was seized, and the defendant failing to bond, the plaintiff executed bond Oct. 20th. and took possession of the movables.

It appears that the plaintiff, in February 1877, had taken the defendant's note for the unpaid December instalment of the previous year, which note was payable the following October, and this fact was unknown to her agent who had made the oath that such instalment was long since due. The note recited that it was given for this over-due instalment of rent. When this was discovered, a supplemental petition was filed Nov. 2d of same year, setting forth the error, making the correction, and producing the note, and praying judgment upon it.

The defendant moved to set aside the seizure on several grounds; 1. that McDowell, who had made the oath and obtained the writ, was not the agent of the plaintiff and had no authority or power to make the affidavit, 2. that the affidavit is insufficient in not stating whether the debt was or was not due, 3. that the affidavit was false in this, that the December instalment of 1876 was not over-due as alleged, a note having been taken for it as above recited, and that the defendant had not attempted to remove any portion of the crop from the premises, nor done or said anything which could produce a reasonable apprehension that he would do it, and therefore the plaintiff had not any reason to believe or fear that he would do it. An answer was also filed, setting up the illegality of the seizure, and praying that the lease be dissolved from the date of the seizure.

Afterwards, in January 1878, the defendant notified the plaintiff's agent that he should continue to hold the place, and cultivate it, during 1878, whereupon the plaintiff sued out an injunction, forbidding the defendant from holding the plantation longer, or doing any act as lessee, and praying that the lease be dissolved. This suit was consolidated with the other, and upon trial of both, judgment was rendered for the

sum claimed, less \$280 deducted from the rent of 1877 because the court held that the lease was dissolved twenty-one days before the expiration of that year by the action of the plaintiff. The judgment then proceeded to dissolve the lease from January 4, 1878, the date of the plaintiff's petition praying such dissolution, and also set aside the provisional seizure. Both parties appealed.

It may be observed here, that since the judgment expressly dissolves the lease from and after January 4, 1878, it does not appear consistent to allow a reduction of the rent for 1877 on the ground that the lease was dissolved twenty-one days before the expiration of 1877.

That McDowell was the accredited agent of the plaintiff is no longer disputed. That a lessor may obtain the writ of provisional seizure upon and for rents not due is indisputable. Code Prac. art. 287. The affidavit states explicitly that the defendant is indebted as charged in the sums specifically set out, and the charge of indebtedness mentioned the several maturities of the instalments, so that it appeared that the debt was not then due. This was equivalent to saying the debt was not due, though not stated in *ipsissimis verbis*, which was not essential. The only remaining ground of the motion to set aside the provisional seizure is the falsity of the affidavit.

The Reports are singularly meagre of authority, upon the question, whether evidence is admissible to disprove the affidavit upon which the writ of provisional seizure is based. In *Macarthy v. Lepaullard*, 4 Rob. 425 a rule was taken to set aside the writ on the ground, among others, that the facts set forth in the affidavit were not true, and the lower court refused to admit any evidence in support of it, and on appeal this court said ;—"This evidence was refused, it appears, because offered for the purpose of supporting the grounds of the sale, some of which belonged to the merits of the case, and others related to the verity of the allegations in the oath, which no law authorizes the defendant to disprove. We are not satisfied that the judge erred." The plaintiff's counsel cite this case as conclusive, under the idea that the words 'which no law authorizes the defendant to disprove' is the language of this court, and is the authoritative statement of a legal principle. A critical examination of the opinion will shew that this is an error. It is really a statement of the ground upon which the lower judge based his refusal to hear the evidence, for immediately following this court, speaking for itself, adds—"we are not satisfied that the judge erred"—and gives as reason, that there was nothing very explicit or precise in the grounds assumed, and it is difficult to separate the grounds for setting aside the provisional seizure from the general merits of the defence to the action.

The only other case is *Salter v. Duggan*, 4 Annual, 280, where the

Thomas vs. Dundas.

court say that the rule taken to set aside the writ (on the same ground of falsity as here) and the testimony adduced, did not go to the main action, but simply to the plaintiff's right to a conservative process by which he desired to protect an alleged accessory of his claim, and considering the severe nature of the proceeding, it was held proper to relieve the defendant from the seizure, where the apprehension of the plaintiff is clearly proven to be mistaken or unfounded. So that neither case expressly decides the point, though the last does by implication, since the clear proof must be assumed to have been admissible.

We think proof is admissible to shew that the affidavit, upon which a writ of provisional seizure is based, is false, when offered upon trial of a rule or motion to set aside the writ, and it was confined to that in *Salter v. Duggan*. The process is sharp and severe, and the party who resorts to it may be required to prove reasonable grounds of his apprehensions, which may be acts or omissions of the lessee, or of his sub-tenants, as in this case.

Primarily the plaintiff or lessor has only to make the oath required by the Code of Practice to obtain the writ of provisional seizure. The lessee may offer proof to shew the falsity of this oath, and then and not till then is the lessor required to fortify his oath by proof of its truth. The terms of this lease as to payment had at no time been complied with. No payment had been made at the maturity of the instalments, and the third payment of the first year was not made at all. It may be said the plaintiff had condoned this by taking a note, but the fact remained as a circumstance to excite apprehension for the future. One of the sub-tenants had taken some cotton off the place, and the plaintiff's agent was informed that cotton was being removed by others at night. Without recapitulating the evidence, it is sufficient to say that the plaintiff's agent had reasonable ground for his apprehensions. The facts or acts which constitute reasonable ground in such cases are not required to be so complete and convincing as are necessary to support a conviction on a criminal charge. They need only be sufficient to rebut any presumption of malice or wantonness in suing out the writ.

The defendant contends that he should not be held liable for any part of the rent for 1877—that his contract was for the possession of the plantation the entire year, and was not susceptible of division, and as the seizure was made before the end of the year, he should pay no portion of the rent. The seizure was of the movables, and as to his possession of the land, he claimed in January 1878 that he had a right to continue its possession and cultivation even during that year, and was only prevented by the plaintiff's injunction from effecting his purpose to retain it.

Thomas vs. Dundas.

The judgment of the lower court is in part erroneous. Therefore

It is ordered, adjudged, and decreed that the judgment of the lower court setting aside the writ of provisional seizure is avoided and reversed, and that said writ is maintained. It is further decreed that the judgment on the moneyed demand be amended by striking out the allowance of two hundred and eighty dollars as a credit on or deduction from the sum sued on, and with this alteration and amendment that the judgment of the lower court is affirmed, the defendant paying costs of both courts.

No. 7144.

THE STATE VS. ARTHUR BOITREUX.

A sheriff can not legally authorize a constable elected in and for another parish to execute, within the parish of which he is sheriff, an attachment issued for an absent witness in a criminal case, and a return made by such a constable that the witness "could not be found," is not sufficient. A return in such a case must be specific, and describe what inquiry and search for the witness had been made.

When a prisoner has, in proper time, ordered subpœnas to issue, he can not be compelled to apply for attachments, swear to the facts he intends to prove by his witnesses, or go to trial without them, until an earnest and vain effort has been made to bring them into court.

Where a reasonable doubt exists as to whether an accused, charged with a capital offense, has had sufficient assistance given to him to enable him to produce his witnesses, he must be given the benefit of the doubt.

A PPEAL from the Fifth Judicial District Court, parish of East Baton Rouge. *McVea, J.*

J. H. Lamon, District Attorney, and *H. N. Ogden*, Attorney General, for the State.

Chas. O. Laue and *Alex. Hebert* for defendant.

The opinion of the court was delivered by

DEBLANC, J. Arthur Boitreaux was indicted, in the parish of Iberville, for the murder of one Alfred Reneaud. He obtained a change of venue, was tried in the parish of East Baton Rouge, and—there—the jury returned against him a verdict of "guilty, without capital punishment." He was, accordingly, sentenced to hard labor in the State Penitentiary, for the term of his life, and—from said verdict and sentence—has appealed to this court.

It appears, by defendant's bill of exceptions that, on the 12th of March, his trial was fixed for the 22d day of that month, and that, on the 12th his counsel ordered subpœnas to be issued for two of his witnesses, Duplessis Bergeron and Virginia Boitreaux, who reside—the first in the parish of Iberville, the other in the parish of Pointe Coupée.

His counsel's instructions were not complied with, and the subpoenas ordered not issued. This grave neglect is not accounted for.

Though, in this respect, the prisoner's instructions had been entirely disregarded, the court, on the 22d of March, granted writs of attachment against said witnesses and postponed the trial to the 28th of said month. Those writs, directed to the sheriff of East Baton Rouge, were—by him—placed in the hands of a constable of the parish of Iberville, specially authorized by him to execute the same, one in and the other out of the parish of the constable's residence.

This was, partly at least, irregular. The sheriff could not, legally, have authorized a constable elected in and for the parish of Iberville, to execute an attachment in the parish of Pointe Coupée. The officer thus deputed could, under the law, have acted, either in his official capacity, or with the sheriff's delegated authority, *but within* the limits of the parish in and for which he was elected and commissioned as constable.

C. P. 765—Rev. St. sect. 633, 641.

He was, however, deputed to execute the important mandates of the court, and his returns thereon were—on that under which he was to attach Bergeron, "*could not find such a man*," and on the other, that under which he was to attach Virginia Boitreaux, "*could not be found*." This was not sufficient.

It is urged, in behalf of the State, that no description of the person or places of residence of said witnesses was given, except that they lived on False River. The answer to this argument is that, when the life and liberty of a prisoner are at stake, and that prisoner chained within the walls of a dungeon, it is the duty of the sheriff or of his deputies, in charge of subpoenas or attachments for his witnesses, to go to his dungeon, and obtain from him any information which may enable them to execute the process of the court; nor is this all: their return must show what steps they have taken, what inquiries they have made, from whom and where those inquiries were made, to find the prisoner's witnesses. It is not for them to *pronounce* that the witnesses cannot be found, they must state every fact which, in their opinion, justifies their belief. This done, and the return presented, the judge then decides whether there has been, on the part of that officer, that diligent search without which the prisoner might be deprived of a constitutional privilege, and his life and liberty arbitrarily imperiled.

Constitution of 1868, art. —, Voorhies, Rev. St. sect. 992.

From merely the naked return "*could not be found*," written at the foot of the writ by one who had no authority to execute it, we cannot—in a cause of this magnitude, even presume that the constable has repaired to any section of the locality which—it is contended—was too vaguely designated; much less can we presume that the witnesses he

was ordered to attach do not exist, or—if existing—do not reside in the designated section.

When—to procure the attendance of his witnesses—the prisoner has, in proper time, ordered subpoenas to issue, he cannot be compelled to apply for attachments, swear to the facts which he intends to prove by them, or go to trial in their absence, until an earnest and fruitless attempt has been made to bring them in court.

On the 28th of March, one of the prisoner's counsel moved for a continuance of his client's case, and based his motion on an affidavit prepared and sworn to by himself, in which he averred that, as the witnesses of the defence had not been subpoenaed, no search could have been made for them, and that, to the best of his belief, the accused could prove by them, and particularly by Virginia Boitreaux, that—prior to the homicide—the deceased had been in constant carnal communication with his—the prisoner's—wife, and the prisoner notified of that fact.

Was the alleged adulterer killed in the bed, while leaving the bed, or trying to escape from the chamber of the accused? Was he killed while the act of adultery was progressing, or immediately after the criminal intercourse, with or without deliberation? The circumstances under which the homicide was committed are not disclosed in the affidavit, and—in this respect—it is insufficient: but though unintentionally—as we have every reason to believe—the prisoner has—to a certain extent—been denied the process guaranteed to him by the constitution and the laws of the State for obtaining witnesses in his favor.

Const. of 1868, art. 6; Rev. St. sect.

“It would appear—as said by Mr. Waterman, in his notes to Archibald's Criminal Practice and Pleadings—that the moral sentiment of the civilized world justifies the homicide of a wanton destroyer of female chastity and domestic happiness.” In such a case, as the fact to be ascertained is whether the infliction of the indignity was the real, the immediate, the exclusive cause of the homicide, those who resent and avenge that indignity, should be vigilantly assisted in every sincere and reasonable effort to procure the attendance of the witnesses by whom the infliction may be established. Here, there is at least a rational doubt that the assistance extended to the prisoner was as complete as it should ever be, and he is entitled to the benefit of that doubt.

It is, therefore, ordered, adjudged and decreed that the verdict returned and recorded against defendant is annulled and set aside, the judgment appealed from avoided and reversed, and this case remanded to the lower court, to be there proceeded with according to the views herein expressed and according to law.

No. 6680.

THE STATE VS. GEORGE BESS.

Where the counsel of a defendant convicted of manslaughter has in due season presented to the lower judge his written bills of exception to the rulings of the judge on matters of law, and without any fault of the accused or his counsel the bills of exception are absent from the files of the court, a new trial will be granted, even though it appear that the application for a new trial was not made to the lower court until after an appeal had been taken.

A PPEAL from the Fifth Judicial District Court, parish of Iberville.
McVea, J.

H. N. Ogden, Attorney General, for the State.

Edward B. Talbot and Chas. O. Lauve for defendant.

The opinion of the court was delivered by

MANNING, C. J. The defendant was indicted for murder—was convicted of manslaughter—and sentenced to hard labour for five years, and appealed. The prisoner's counsel reserved several bills of exception to the charge of the court, which were prepared for the judge's signature, and handed to the clerk. The judge obtained them from the clerk for the purpose of assigning his reasons for the ruling, and they have not since been seen. The judge never assigned his reasons, and did not return the bills to the clerk. This was in April 1876.

In May 1877, another judge being on the bench, an application was made for a new trial, reciting the above facts, and stating that "the counsel of the prisoner requested the judge, E. F. Dewing now residing in New Orleans, to return said bills of exception into court in time for the appeal, and was assured that the same would be done, but they have never been returned." The counsel also allege that they cannot remember the reasons or grounds of exception, except those set forth in one of the bills. The judge then sitting refused the new trial because an appeal had been taken, and his jurisdiction had ended.

Technically, and perhaps really, this was true, but we cannot refuse to grant a new trial. The prisoner was charged with the gravest of crimes—was convicted of one, the penalty of which was the deprivation of his liberty, and had been sentenced to five years' confinement. His counsel had excepted in his behalf to what they conceived to be erroneous ruling of the court in matter of law,—and incorporated their objections in bills reduced to writing apparently in due time,—and by no fault of theirs, or of the prisoner, they were absent from the files of the court. Indeed it is not disputed that they came into the possession of the judge, who was unmindful of the fact that his retention of them was jeoparding one of the dearest rights of a citizen. If we should not

State vs. Bess.

grant the new trial, this retention would not only have jeopardized, but have lost to the prisoner his liberty for half a decade. We cannot permit such a result to be accomplished by the negligence and carelessness of a judge.

A new trial of the prisoner is ordered, and the cause is remanded in order that it be had.

7299.

THE STATE VS. STEPHEN PERKINS.

The confession of one indicted for larceny, made while in custody, and without any threat, promise of reward, or immunity from punishment, is admissible in evidence.

A PPEAL from the Twelfth Judicial District Court, parish of Franklin.
Smith, J.

H. N. Ogden, Attorney General, for the State.

C. J. Boatner for defendant.

The opinion of the court was delivered by

MANNING, C. J. The defendant was indicted for stealing a hog, and upon conviction was sentenced to one year's hard labour.

The only bill of exception taken was to the admission in evidence of the prisoner's confession. He had been arrested by six men, none of whom were officers and without any warrant. One of these was armed with a pistol, and two others had shot-guns. While held in custody thus, and while under guard, without any threat, or promise of reward, or of immunity from punishment being made, and without any violence being offered or threatened, the prisoner confessed the larceny. The court, in assigning its reasons for admitting the confession, says the confession was purely voluntary, that the prisoner requested the person to whom it was made to step aside with him as he wished to tell him something, and did tell him without solicitation, or promise, or threat the fact of the larceny, and the circumstances under which it was committed.

We think the confessions were properly admitted. 1 Wharton Crim. Law, § 683.

Judgment affirmed.

No. 7372.

SARAH T. BOWMAN ET AL. VS. P. G. A. KAUFMAN, SHERIFF, ET AL.

Where the plaintiff in injunction, and the surety on her bond take separate suspensive appeals from the judgment dissolving the injunction, and the plaintiff's suspensive appeal is dismissed and a judgment on appeal is rendered against her surety, her right to take a devolutive appeal will not be suspended while the application for a rehearing on the part of her surety is pending. She has a right to a devolutive appeal so soon as the decree dismissing her suspensive appeal becomes final.

On the merits, the judgment rendered by this court in this case, in the 30th Annual, p. 1021, is adhered to.

A PPEAL from the Seventh Judicial District Court, parish of West Feliciana. Yoist, J.

Samuel J. Powell for plaintiffs and appellants.

W. W. Leake for defendants and appellees.

The opinion of the court was delivered by

SPENCER, J. This case was before us last year, see 30 A. 1021.

Mrs. Bowman's appeal was dismissed on March 6, on motion of defendants and appellees. We maintained the appeal of her surety on the injunction bond.

No application was made for rehearing by Mrs. Bowman, and our decree dismissing her appeal became final six judicial days after its rendition—i. e. on March 13.

On 23d April following, Mrs. Bowman took a second and devolutive appeal, citing all parties as appellees.

On March 6, the date of dismissing Mrs. Bowman's appeal, the appeal of the surety was decided, reversing in general terms the judgment below, and perpetuating plaintiff's injunction.

Defendants applied for and were granted a rehearing to correct this manifest error of the decree on the merits, and the court restricted its terms so as to operate only in favor of the surety.

It is now urged by appellees that this second appeal of Mrs. Bowman, on April 23, was premature, because the jurisdiction of this court continued in consequence of appellees' application for rehearing up to May 6, when the decree *on rehearing* was rendered.

We think this an error; there was no rehearing asked on the motion to dismiss Mrs. Bowman's appeal. Mrs. Bowman did not and the appellees who moved for the dismissal could not ask it. The rehearing was asked by appellees as to the judgment in favor of the surety on the merits. After her appeal was dismissed, Mrs. Bowman was in the cause only as appellee, and our decree could not pass upon issues between appellees.

The general terms of our first decree on the merits were the result

Bowman et al. vs. Kaufman, Sheriff, et al.

of inadvertence, and would, even without the correction made on rehearing, have been necessarily limited to the issues between the sole appellant and the appellees. We could not in the nature of things reverse a judgment as between two appellees.

Mrs. Bowman's appeal having been dismissed by a decree final on March 13, she had the right to renew it, at any time thereafter, before the year expired.

The fact that a party is one of the appellees in a cause does not prevent his appealing subsequently from the same decree in order to have it corrected as between him and the other appellees. It is the only mode of relief open to him, since he can only file an answer asking amendments as against appellant.

The motion to dismiss is overruled.

ON THE MERITS.

The case is identical with that decided by us on the appeal of the surety, and is submitted on the same record and briefs.

We have twice before examined this case on its merits, and a third examination has not altered our views as expressed in our former opinions, to which we adhere.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be avoided and reversed, and it is now ordered that plaintiffs' injunction be made perpetual, and that defendants pay costs of both courts.

No. 7395.

ROTH DEBLIEUX & Co. vs. JOSEPH HOTARD.

A decree of court refusing to order the executor, on motion of a judgment creditor of an heir, to turn over to the sheriff the undivided portion of the heir in a succession whose debts and legacies have not been paid, is an interlocutory decree from which the creditor can not appeal.

The executor can not be compelled, under the garnishment process of a judgment creditor of an heir, to surrender the undivided portion of the heir in a succession whose debts and legacies are unpaid.

A PPEAL from the Fifth Judicial District Court, parish of Iberville.
McVea, J.

Alex. Hebert for plaintiffs and appellants.

Barrow & Pope for intervenor and appellee.

The opinion of the court was delivered by

SPENCER, J. Plaintiffs being judgment creditors of Joseph Hotard

Deblieux & Co. vs. Hotard.

caused a *fi. fa.* to issue, and made Samuel Mathews, testamentary executor of Alexander Hotard, deceased, garnishee.

McWilliams, another judgment creditor of Joseph Hotard, intervened, denying plaintiffs' right to seize by garnishment of the executor the rights of Joseph Hotard in the succession of his deceased father, Alexander Hotard. He further claims to be the first judicial mortgage creditor of Joseph Hotard, and claims to be paid by preference out of his hereditary interest in the said succession, the same being subject to his judicial mortgage. This intervention and opposition has not been put at issue or tried.

Mathews, the executor, answers the interrogatories propounded to him in substance as follows:

That he is the testamentary executor of Alexander Hotard, with seizin by the will of his entire estate, which is now being administered by him. That there are by said will special legacies to a certain stated amount, and an unknown amount of debts, and also expenses of administration yet to be ascertained. That he holds in his said capacity, as shown by the inventory, real estate valued at \$18,800, personal property at \$4296 70, and cash \$5516. That Joseph Hotard is an heir to one tenth of said estate; that it is as yet unknown what is due him, and it can not be known until said estate is administered and settled.

Thereupon plaintiffs suggesting to the court that it appears by the answers of the garnishee that he had property and effects belonging to the judgment debtor, Joseph Hotard, moved the court that said executor "be ordered to turn over into the hands of the sheriff all the property, rights, credits, and money now under his control, when same shall become due, and that same be applied to satisfy as far as it may the writ of *fi. fa.* in the hands of said sheriff against Joseph Hotard."

After hearing, the court refused said order and plaintiffs appeal.

Appellee has moved to dismiss this appeal on the grounds that if the order appealed from is a final judgment it is not signed, and if interlocutory it does not work irreparable injury.

We think the order interlocutory, and the injury, if injury there can be, not irreparable. The substance of the motion is, to take the property out of the hands of one officer, the executor, and put it into the hands of another officer, the sheriff. It is manifest that until said succession is administered, and its debts and legacies paid, the executor can not be compelled to surrender the property, or any part thereof.

It is equally manifest that until said succession has been partitioned among the heirs or their assigns no specific sum or thing can be turned over to Joseph Hotard; much less an undivided tenth of an aggregation of things. What authority or mission have the executor of the deceased and the creditors of one heir to ascertain, fix, and determine

Deblieux & Co. vs. Hotard.

the amount or things to be turned over to that heir in a proceeding to which the other heirs are not parties?

If, therefore, the plaintiffs have by their garnishment made a valid seizure (upon which we express no opinion), they can suffer no injury by the property being left in the hands of the executor, to be by him administered under supervision of the court, to the end that the debtor's interest therein, the thing supposed to have been seized, may be ascertained, fixed, and determined. If the seizure is valid, it is not, nor is the privilege resulting therefrom, impaired by leaving the property where it ought to be, in the hands of the executor. No irreparable injury can result therefrom.

It is therefore ordered that this appeal be dismissed at costs of appellant.

Mr. Justice WHITE recused.

No. 6953.

J. W. MONTGOMERY VS. E. T. WILSON ET AL.

The creditor of a vendor can not maintain a revocatory action to rescind the sale on the ground that the sale was in fraud of the vendor's creditors, unless he shows that the vendee was a party to the fraud. The fact that the price of the sale was below the actual value of the property does not authorize a conclusive presumption that either the vendor or vendee was actuated by a fraudulent intent.

A PPEAL from the Thirteenth Judicial District Court, parish of East Carroll. *Hough, J.*

J. W. Montgomery, in propria persona, appellant.

W. G. Wyly & J. M. Kennedy and C. M. Pitcher for defendants and appellees.

The opinion of the court was delivered by

MANNING, C. J. This is a revocatory action, in which the plaintiff seeks to annul a sale from Wilson to his co-defendant Ingraham of certain lands, and the sale of one half the same property by the latter to one Davis, also a defendant. Wilson owed the plaintiff over two thousand dollars. The debt was originally due the law firm of Sparrow & Montgomery, of which plaintiff was a member, and was acquired by him by transfer.

Wilson made the sale to Ingraham on Nov. 28, 1874, the price being \$10,000, of which one tenth was cash, and the residue was payable in four equal annual instalments. In less than a week, Ingraham sold the undivided half to Davis for five hundred dollars cash, and Davis as-

sumed the payment of one half of Ingraham's notes. Wilson removed to Texas shortly afterwards.

The petition alleges an intention by the debtor and vendor to defraud—the knowledge by the successive vendees of that intention, and their co-operation in effecting the fraud—and the accomplishment of the purpose through a sale of all the debtor's property, and the placing the proceeds thereof beyond the creditor's reach.

If the plaintiff has succeeded in sustaining these allegations by satisfactory proof, he will be entitled to a revocation of the sale, for it is not to be tolerated that a debtor shall be able to alienate all that he has to pay his creditor with, and his vendee, a participant in his fraud, shall reap benefit from the wrongdoing, and the creditor shall have no redress.

Ingraham avers in defence, that he bought in open market, in good faith, and for a valid consideration, and Davis reiterates these averments for himself. Wilson denies fraud, and alleges that, being desirous of removing from this State and establishing himself in a new country, he offered his property to divers parties for the same price at which he afterwards sold to Ingraham, and among the persons to whom he thus offered to sell was the present plaintiff, who refused it. Had he stopped there, the answer would have been straightforward and unobjectionable, but he adds—"the notes sued on were obtained without consideration and the signature thereto obtained through fraud and duress."

The notes were executed by him to Sparrow & Montgomery to defend him from an indictment for murder, and there is not a line of proof in the whole of the voluminous testimony to support the shameless pretence that the fee was not promised willingly by the imprisoned accused, or that his benefactors, who gave their time, character, and learning, successfully to his defence, extorted from his necessities what was but the guerdon of their services.

The Code has consecrated certain fundamental principles of equity touching the relations of debtor and creditor, and the acts which may not be done by the one so as to affect the interests of the other. Thus it says, that every act done by a debtor with intent of depriving his creditor of the eventual right he has upon the property of such debtor is illegal, and ought, as respects such creditor, to be avoided. art. 1964. But only those contracts of the debtor can be avoided that are made in fraud of creditors, and such as would actually defraud them, if carried into execution, for if they are made in good faith, they cannot be annulled, even though they may prove injurious to creditors; and if in bad faith, they cannot be rescinded unless they operate to their injury—art. 1973. new nos. 1969 and 1978.

And as to those, with whom the debtor has made the contracts, if

Montgomery vs. Wilson et al.

the contract be onerous, but made in fraud on the part of the debtor, but in good faith on the part of the person with whom he contracted, if the value of the property transferred by such contract exceed by one fifth the price or consideration given for it, the creditors may annul it, and take back the property on paying the price with interest. But if the person, with whom the debtor contracted, be in fraud, as well as the debtor, he shall not be entitled to a restitution of the price, when the contract is annulled, except only to so much thereof as he shall prove has enured to the benefit of the creditors by increasing the value of the property. arts. 1976—7. new nos. 1981—2.

So Marcadé—il faut que l'acte, pour pouvoir être révoqué, ait nui au créancier et ait été fait frauduleusement. Il faut d'abord que l'acte ait nui au créancier, en causant ou augmentant l'insolvabilité du débiteur, car, si celui-ci n'était devenu insolvable que plus tard, ce ne serait plus l'act lui-même, mais telle ou telle circonstance postérieure, qui aurait causé la perte. Il faut en outre qu'il y ait en fraude du débiteur, c'est-à dire qu'il ait accompli l'acte sachant le tort qu'il causerait à ses créanciers, connaissant son insolvabilité. Exp. du Code Napoleon *to. 4, § 497.*

It appears that the act of sale from Wilson to Ingraham did not include the whole of the land, a small strip of the tract lying just above Lake Providence having been left out, not by design but through misdescription. Magruder, a judgment creditor of Wilson, seized this outlying strip in Dec. 1875. Ingraham and Davis enjoined the enforcement of this seizure, alleging that the conveyance from Wilson did include that strip, and that their title, derived from him, transferred the ownership of the whole property to them. The plaintiff was the lawyer of Ingraham and Davis in this injunction suit, signed the petition, assisted in conducting the trial. The injunction was dissolved. Ingraham and Davis plead now the estoppel by conduct against the plaintiff. This suit of Magruder was in the parish court, and was appealed to the District court, but before hearing, Davis paid Magruder's judgment either from his own funds, or from funds furnished by parties interested, and in May 1876 Wilson made a supplemental deed, conveying to Ingraham the strip of land, and reciting that it was the intention of both parties to include it in the sale of 1874, and thus effectuating their will and understanding. No additional price was paid or stipulated. The present suit was instituted after the date of this second deed.

The evidence is entirely satisfactory that there was no fraud on the part of Ingraham or Davis. Wilson's desire to sell, and intention to sell, was not a secret. The lawyers of the village all knew of it, and the offer was made to some of them. F. F. Montgomery, one of plaintiff's counsel, was told by Ingraham that the property could be bought

very cheap, and thinks \$7,000 was mentioned as the sum—that Wilson was determined to sell, and wanted to give him (Ingraham) the preference, and Ingraham wanted him (the witness) to go in with him, and that he took “the matter under advisement, and tried to get Mr. Delany to go in, but received no encouragement from him, and owing to the great uncertainty about the value of any kind of property here then, I let the matter drop. An additional reason was, I did not care to go in debt.” One of the reasons assigned, he thinks, for Wilson’s desire to sell was his alarm about the Sparrow debt, and the impression made upon the witness by Ingraham at this interview was, that Wilson wanted to get rid of the Sparrow debt. He adds, “Mr. Ingraham did not communicate to me any intention or desire to defraud Gen. Sparrow, or any other creditor of Wilson. He said he had advised Wilson to go to Gen. Sparrow and make some satisfactory arrangement. I recollect once, I think very soon after the institution of this suit, I proposed to Mr. Ingraham to buy his interest, and tried to get him to fix his terms. After thinking of it a day or two, he told me he declined to sell, because Dr. Davis was not willing. I was sorry I did not go into this arrangement for the purchase of this property, but I did think it a good trade, and was willing to buy from Ingraham.” The witness intended, in the event of purchasing, to compromise the ‘Sparrow debt,’ now held by the plaintiff.

Mr. Delany, also counsel for plaintiff, repeats the statement that Ingraham before his own purchase apprised him and his law partner that “this property could be purchased from Wilson for a small sum, and wanted them to go in with him and purchase it.”

Wilson swears that he offered to sell to the plaintiff, but the plaintiff states unequivocally that he has no recollection of such offer. Wilson states the offer thus ;—“I made a written proposition to Gen. Sparrow proposing to take \$10,000 for it (the property) taking the notes he had against me as part payment, and \$2,000 in money, the balance in one, two, and three years with interest from date. He, Sparrow, refused the proposition and referred me to J. W. Montgomery his partner. I then made the same proposition to him and he also refused to accept it. I told them both that I was going to sell the property. I made to Sparrow and Montgomery the first offer.”

Ingraham’s testimony is copious, and it has the ‘ring’ of honesty. His physical infirmity does not appear to have abraded his moral sense. Only a part of the testimony can be transcribed.

“I had been trying to get Gen. Sparrow to buy Mr. Wilson out for about a year ; requested Wilson to go to Gen. Sparrow’s house, not his office, that I thought the General would do what was right. Mr. Wilson returned. Told me he had seen the General. I then went and

saw Gen. Sparrow myself, and asked him if Wilson had been there. I asked the General, why he did not buy his property,—that Wilson was in trouble and wanted to leave this country, after getting clear of the murder scrape. He replied, “Wilson asked too much for his property, and I’m too old to go in debt.”

The General did not tell me what Wilson charged him for the property. Wilson had been asking ten thousand dollars for the property. Gen. Sparrow said he would see Judge Montgomery, may be he would buy it; that closed the interviews. Mr. Wilson said he could not get Gen. Sparrow to buy his property; he had offered it to me a year before I purchased it. I think it was generally known that Wilson was trying to sell his property and go to Texas. I told Gen. Sparrow, that Mr. Wilson had been in trouble and wanted to sell his property and go to Texas. Mr. Wilson was quite a young man. I had understood from a friend of Mr. Wilson’s that he would take seven thousand (\$7,000) dollars for his property. I went to the office of Messrs. Montgomery & Delany, and told them what I had heard; that he would take seven thousand dollars for his property, and proposed them to go in and we would buy it of him. Messrs. Montgomery & Delany were both present, they declined the proposition, saying the property was worth little or nothing, they could never sell the lots; the plantation was in a bad fix, which it was—no fence, ditches being filled up, and it was a cocoa patch, which it was. I talked with Gen. Sparrow about Wilson being greatly alarmed about his, Sparrow’s debt, it was so large; he Wilson could never pay it without selling his property. When I bought this property from Mr. Wilson, he told me he would pay every dollar he owed in this parish. Called Judge DeFrance in to witness the promise to me, as I would not have anything to do with the sale if there was anything wrong in it, which I told him. I told Mr. Wilson that if there was any fraud in this sale I would have nothing to do with it. He said to Judge DeFrance, “Judge, I am selling out to pay my debts,” that he would pay every cent he owed before he left the country. I consider the price I was giving Mr. Wilson for the property as a very high price at the time of the sale. I understood that Mr. Wilson owed nothing, except a debt of about \$2,000 to Gen. Sparrow. He said the price I was paying him for the property would be ample to pay all his debts, and give him means of subsistence in Texas. At the time of the sale Wilson was not insolvent, the price I gave him for the property was a good deal more than what he owed. I have known Gen. Sparrow for about thirty years, and have been intimate personal friends for twenty years, and am still a warm friend of his. I never had any motive or desire to defraud Gen. Sparrow, or Judge Montgomery, or impede the collection of their debt against Wilson or any one else. When I purchased the

property, I had no impression of any motive on the part of Wilson to defraud either Gen. Sparrow or Judge Montgomery. He had stated to me he would pay every dollar he owed before he left the parish. I told Mr. Wilson that if I had the least idea of any intention on his part to defraud Gen. Sparrow or Judge Montgomery, or any one else, that I would have nothing to do with his property. I have been living in this parish thirty-five years. I have been engaged in managing the largest plantation in this parish for others, and have been a planter myself since I have been here. I had a large acquaintance among the old settlers, and I believe I know most every body that's here now. I have always thought that I enjoyed the confidence of the people of the parish, ever since I have been here. I have had a great many business transactions with the people of the parish of Carroll. This is the first time since I lived in this parish of Carroll that I have been dragged before the courts on a charge of fraud. I paid one thousand dollars cash money, and Major Oliver counted the money. I have always been able to make moneyed arrangements, and believe I am abundantly able to buy the property."

This testimony was objected to, but properly admitted, as being in rebuttal of that offered by plaintiff, and responsive to that part of the defence which repelled the charge of fraud. Without going into a recital of the testimony relative to Davis' alleged participation in the fraud charged, it is sufficient to say that the evidence in its entirety satisfies us that Wilson had made up his mind to go away, and this removal, determined on with deliberation, was carried out with persistency. "I had gone out to Texas the July previous to look out a location to move to, and had made my arrangements to remove there. I had been involved in personal difficulties and trouble, and I felt that a change of association and location would be to my advantage."

The execution of this fixed resolve to get away from his surroundings was obstructed, or delayed, alone by his inability to sell his property. He tried to sell it to Gen. Sparrow, and pay the debt now owned by plaintiff as part of the price. Gen. S. then owned one half of the debt. He tried to sell to others, and notably to lawyers who held a claim against him. No one would buy. No doubt his desire for removal became morbid. His words above quoted shew it was not a transient notion, but a fervent desire. He offered to sell to Ingraham, and Ingraham offered inducements to others to buy along with him. Everybody had a chance to buy cheap, but nobody would buy, until finally Ingraham closed the negotiation and bought. Then everybody found out that the property had been sold for a bagatelle, compared with its real value, and many believed it had been sacrificed.

The same thing occurs every week here. The witnesses who fixed

the value of this property at (one of them as high as) \$19,000, forget that the value of property in legal phrase is what it will sell for, and that the witness himself could have bought it for \$7,000 and refused it. Gen. Sparrow would not buy it, because he would not encumber himself, even though an opportunity was afforded to realize the debt due to his partner and himself, and Mr. F. Montgomery was afraid of debt, and besides the value of all property was very uncertain. What appeared cheap that year might prove to be an onerous bargain the next year. Mr. Delany took the same view. The two witnesses, Sutton and Murfee, bought single lots at large prices, which form no criteria of the market value of the whole. Every one, to whom the offer to buy was made, knew that he could sell a single lot here and there for an enhanced price, but for all that he did not choose to try the speculation, because there were so many risks to run, and the future was so uncertain. The assessment was \$6,000, and though that is not of itself proof of value, it is a fact worthy of note along with others tending the same way.

Sales cannot be disturbed upon hypothetical valuations or estimates of property, or upon the diminution of the price below what witnesses think it ought to have brought, or below what its actual value may be supposed to be. Its actual value as a saleable commodity is conclusively shewn to be the sum it actually brought in open market, with free competition, and fair opportunity to all comers to bid.

The fact that Wilson has not paid the debt to the plaintiff, which every consideration of honor and honesty demand should be paid, is an unfavourable and prejudicial fact to him. But the sale was not made with the intent of depriving his creditor of his eventual right upon the property. On the contrary he sought at first to enable the creditor to realize that right, nor was the party who contracted with him in bad faith, nor the price other than what it had been offered at without success. The plaintiff, upon this state of facts, proved with detailed circumstantiality, is not entitled to have the sale revoked.

The judgment is affirmed as to Ingraham and Davis, but must be reversed as to Wilson, and one of nonsuit entered.

The land was attached as the property of Wilson, and process of garnishment was taken against Davis. The plaintiff sued upon the notes, and an absolute judgment in Wilson's favor might be pleadable in bar of a future pursuit of him. Therefore

It is ordered and decreed that the judgment of the lower court is affirmed except that part thereof which is absolute and unqualified in Wilson's favour on the demand for the amount of the notes, and as to that, that there be judgment in his favour as in case of nonsuit, the appellees to pay costs of appeal.

DISSENTING OPINION.

SPENCER, J. I concur in the decree so far as relates to the half interest of defendant Davis in the property attached. He purchased from Ingraham before this suit was brought, and there is no satisfactory proof that he was cognizant of, or party to, what I think were the fraudulent acts of Wilson and Ingraham.

Fraud is a ground of nullity in contracts only as between and against parties to them. It differs in this from error or lesion, which vitiate contracts absolutely. Thus a *bona fide* purchaser, without notice, will not be affected by frauds perpetrated between his vendor and antecedent owners of the property.

But as to the half interest of Ingraham, I think the sale should be avoided. He was the confidential friend and adviser of Wilson, and evidently well advised as to his purposes and intentions. He was over anxious that Wilson should do the fair thing with his creditors, Sparrow & Montgomery. He sent Wilson to Sparrow a day or two before he himself bought, with instructions to offer Sparrow the property. But note the terms. Ten thousand dollars *in money*, and the surrender of the notes held by Sparrow for \$400 more. This, too, at the very time Ingraham was telling F. F. Montgomery and Delany that Wilson would sell out for \$7000, and was endeavoring to persuade them to join him in the purchase. F. F. Montgomery, a perfectly reliable and disinterested witness, says that he gathered from Ingraham's conversation that Wilson was anxious to avoid, "to get rid of" the Sparrow & Montgomery debt, and that that was his motive for selling. True, F. F. Montgomery declined to join in the purchase, for reasons satisfactory to himself, but this in nowise breaks the force and credit of his statements as to what Ingraham said and did. Finally, Ingraham concludes to purchase *alone*, at nominally \$10,000, of which \$1000 were to be cash and the balance on long time.

He proceeded with unusual, nay, suspicious caution. When he agreed with Wilson on the price and terms he calls in Judge DeFrance, and proceeds to declare himself in substance as follows: "I have agreed to buy Ed. Wilson's property at such a price; but now, Ed., if there is any fraud in this—if you are doing any thing to defraud your creditors, I won't have any thing to do with it." Whereupon Wilson, *of course*, protests his *good faith*, and avers that so far from selling out to defraud his creditors, he is doing so to pay them. Having thus laid the *bona fides* of his conduct on a sure foundation, the parties proceed to the notary to pass the act. Mark Ingraham's caution here. He was determined that there should be no "afterclaps." Major Oliver, a prominent citizen, is requested to come in and count the money. Wilson receives the money and notes, ostensibly discounts the latter at the rate of

twenty-five per cent to S. W. Davis, and departs for Texas. This whole transaction between Wilson and Ingraham bears, to my mind, the brand of collusion upon its very front. Their whole conduct is unusual, and evinces a degree of caution and painstaking which is not the natural production of good faith. Wilson is shown by this record to have received (if in truth he received any thing) but about \$6000 cash for this property, and yet much stress is laid on his having offered it to his creditor a few days before for \$14,000. So far from this offer to Sparrow proving Wilson's good faith, to my mind it is one of the strongest evidences of the contrary.

The effect of this transaction was to put Wilson's property beyond the reach of his creditors, if it be maintained. It was to render him, *quoad* his creditors, to all intents and purposes insolvent, and to defraud them. The rule in this matter is, that if "the effect of the act" is to injure and defraud the creditors it may be avoided. C. C. 1978; 9 R. 273. Of course, if a debtor has available, tangible, seizable property sufficient to pay his debts, his creditors can not complain; but it would be a mockery of justice to say that a debtor can convert and pocket the whole of his property *in money*, with the avowed and known purpose of defrauding his creditors, and yet the purchaser, his adviser and co-adjutor in these acts, can defeat the revocatory action of creditors by *suggesting* that the debtor is not insolvent, but has *more money* in his pocket in Texas than his debts amount to. Our law says that when a party *has sold or is about to sell*, has converted or is about to convert into money his property to defraud his creditors, they may attach. If the sale, as in this case, is *omnium bonorum*, the law presumes fraud, and the creditors of necessity have the right to couple the revocatory action with a writ of attachment. Of course, if the revocatory action fails by reason of the good faith of, and good consideration given by the purchaser the attachment will fall; but not otherwise.

I think the sale as to Ingraham's half should be avoided and the attachment maintained.

ON REHEARING.

WHITE, J. Involving mainly a question of fact, we granted a rehearing of this cause, to afford us a second opportunity to examine the testimony. That re-examination we have carefully made, with the help of additional oral and written argument from both parties, and it has served only to strengthen our original conclusion.

It is therefore ordered, adjudged, and decreed that our former decree remain undisturbed.

Justice SPENCER adheres to his original dissenting opinion.

No. 7148.

THE STATE EX REL. H. W. SOARES VS. HEBREW CONGREGATION "DISPERSED OF JUDAH."

This Court has jurisdiction of a suit in which the appellant, in his affidavit accompanying his application for an appeal, places his damages, at issue in the suit, at over \$500.

The failure to perfect a suspensive appeal does not prevent the appellant from subsequently obtaining a devolutive appeal.

A mandamus will not lie to compel a religious society to restore to its membership one who had been expelled by a decree of the legally constituted church judiciary, on account of an alleged violation of some one or more of the laws of the society. The civil courts will not revise the ordinary acts of church discipline, or the administration of church government.

A suit by an expelled member to compel restoration to a church membership on the ground that such restoration is necessary to enable him to enjoy the right of sepulture acquired by him as a member, is premature.

A PPEAL from the Fourth District Court, parish of Orleans. *Houston, J.*

H. H. Walsh for plaintiff and appellant.

Kelly & Lazarus for defendants and appellees.

The opinion of the court on the motion to dismiss was delivered by EGAN, J., and on the merits by MANNING, C. J.

ON MOTION TO DISMISS.

EGAN, J. The appellee moves to dismiss this appeal; first, because the court is without jurisdiction *ratione materie*, the plaintiff having in his petition fixed his damages at \$200; second, because plaintiff had obtained a former order of appeal which he had not presented, and has therefore abandoned and can not renew his appeal. As to the first ground; the petition alleges that plaintiff has been damaged to an amount *far exceeding* two hundred dollars, and an affidavit accompanying the application for appeal places the amount of his damages or interest in this suit at over \$500. See *Crescent City Live Stock Landing & Slaughterhouse Co. vs. John Larrieux*, and same vs. Wm. Cecil Kenner, recently decided.

The proceeding is not for the recovery of money, but for restoration to all relator's alleged rights and privileges as a member of defendant congregation. As to the second ground; the former application was for a suspensive appeal only. We agree with the court in *French, Adm., vs. Mc Vay*, tutor, 21 A. 192, that a suspensive and devolutive appeal may as well be granted by separate as by the same order, and that the failure to perfect the suspensive appeal does not preclude a subsequent devolutive appeal. There was no bond filed for suspensive appeal, and the jurisdiction of this court never attached. There was therefore no ap-

State ex rel. Soares vs. Hebrew Congregation Dispersed of Judah.

peal to abandon. If unable or unwilling to give bond for suspensive appeal, the plaintiff who had never before obtained an order for a devolutive appeal had a right to apply for and obtain it at any time within the delays of the law. It might have been otherwise had he once filed his bond for appeal on motion in open court and then failed to file or prosecute it.

The motion to dismiss is overruled.

ON THE MERITS.

MANNING, C. J. The relator is an Israelite, and was a member of the Congregation of the Dispersed of Judah, a corporation organized and chartered under the laws of this State. On June 13, 1877, he was expelled therefrom, he alleges illegally and arbitrarily, and now prays that a writ of mandamus be directed to the officers of the corporation, compelling them to restore him to his rights and privileges of membership.

The answer admits the membership of the relator prior to the date mentioned, and avers that on that day, at a meeting of the Congregation, there being present a legal quorum thereof, certain charges were preferred against him of gross misconduct, upon which testimony was received, and of which he was found guilty, and was thereupon expelled by a vote of three fourths of the members present, which mode of proceeding, it is averred, is in accordance with the constitution and laws of the Congregation. The Respondent then pleads to the jurisdiction of the court, averring that such expulsion is wholly within the cognizance of the ecclesiastical tribunal, provided by the corporation of which he was a member, and that the civil courts have no authority to inquire into, or revise the same.

The correctness of this return to the alternative writ is verified by the oath of the President of the Congregation, and was not traversed by the relator, nor was any proof offered to impugn its truth. The case therefore presents the naked question, whether the civil courts can or will revise the ordinary acts of church discipline, or the administration of church government.

The entire separation of Church and State is not the least of the evidences of the wisdom and forethought of those who made our national constitution. It was more than a happy thought—it was an inspiration. But although the state has renounced all authority to control the internal management of any church, and refuses to prescribe any form of church government, it is nevertheless true that the law recognizes the existence of churches, and protects and assures their right to exist, and to possess and enjoy their powers and privileges. Of

course wherever rights of property are invaded, the law must interpose equally in those instances where the dispute is as to church property as in those where it is not, and it also takes note of, but does not itself enforce, the discipline of the church, and the maintenance of church order and internal regulation. The law does not assume, and will not declare, that a particular religious association is more truly the church than another, but each and all of them are permitted to make their own regulations, and to enforce them in the manner each has provided for itself.

This whole subject was maturely considered and elaborately expounded in *Watson v. Jones*, 13 Wall. 679, where the court say ;—In this country the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect. The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned. All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed. It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognisance, subject only to such appeals as the organism itself provides for, p. 728.

The court refer in that opinion to *Harmon v. Dreher*, 2 Speer's Eq. 87 (S. C.) as one of the most careful and well considered judgments upon the subject, in which it is said ;—It belongs not to the civil power to enter into or review the proceedings of a spiritual court. The structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference. On the other hand, it has secured religious liberty from the invasion of the civil authority. The judgments, therefore, of religious associations, bearing on their own members, are not examinable here and I am not to inquire whether the doctrines attributed to Mr. Dreher were held by him, or whether, if held, were anti-Lutheran ; or whether his conduct was or was not in accordance with the duty he owed to the Synod or to his denomination. * * * When a civil right depends upon an ecclesiastical

State ex rel. Soares vs. Hebrew Congregation Dispersed of Judah.

matter, it is the civil court and not the ecclesiastical which is to decide. But the civil tribunal tries the civil right and no more, taking the ecclesiastical decisions out of which the civil right arises as it finds them.

So too in Missouri in the State *ex rel.* Watson v. Farris—it was said, the utter impolicy of the civil courts attempting to interfere in determining matters which have been passed upon in church tribunals, arising out of ecclesiastical concerns, is apparent. It would involve them in difficulties and contentions, and impose upon them duties which are not in harmony with their proper functions. Before a court could give an enlightened judgment, it would be necessary to explore the whole range of the doctrine and discipline of the given church and survey the vast field of the divine word.

And in Kentucky the binding force and completeness of the church's action is thus stated ;—Every person entering into the church, impliedly at least, if not expressly, covenants to conform to the rules of the church, to submit to its authority and discipline. Appellant when he became a member thereof placed himself in this condition. * * * Whether in what the church did it acted right or wrong, this court cannot approach its precincts to inquire, and is powerless to redress any wrong inflicted on appellant thereby. By becoming a member of the church he subjected himself to its ecclesiastical power, and neither this nor any other earthly tribunal can supervise or control that jurisdiction. *Lucas v. Case*, 9 Bush, 297.

And finally the rule is enunciated by an approved modern writer thus ;—The principle may now be regarded as too well established to admit of controversy, that in the case of a religious congregation or an ecclesiastical body, which is itself but a subordinate member of some general church organization, having a supreme ecclesiastical judicatory over the entire membership of the organization, the civil tribunals must accept the decisions of such church judicatory as final and conclusive upon all questions of faith, discipline, or ecclesiastical rule, and the party aggrieved cannot invoke the aid of the civil courts to have such proceedings reversed. *High on Injunctions*, sec. 233.

One of the allegations of the petition is that by the expulsion of the relator from the congregation, the right to be buried in its burying-ground will be, or is denied him, and the celebrated case of *Guibord* is cited as an instance where the civil courts took cognizance of the refusal of sepulture by the ecclesiastical authorities, and enforced the party's right to burial in consecrated ground. The final decision of that case was by the Judicial Committee of the Privy Council in England, and courts there go much further than they would do here in enforcing rights appertaining to, or growing out of, ecclesiastical matters. But it is sufficient to say, in disposing of this part of the complaint, that

State ex rel. Soares vs. Hebrew Congregation Dispersed of Judah.

Guibord was dead, and the object of the proceeding in his case was to procure the interment of his body in that part of the Montreal cemetery which was consecrated, whereas the relator has happily no present need of enforcing his claim to burial anywhere, and *non constat* that before he does need it, he will have his ban of excommunication removed, and be restored to full fellowship in the congregation.

It sufficiently appears from what has now been said that we think the relator's demand cannot be enforced by the civil courts. The return or answer to the alternative writ set up as grounds why the peremptory writ should not issue that the relator had been excommunicated according to the rules adopted and in force in the congregation from which he was expelled, and the by-laws in evidence shew what these rules were. The judicatory provided by those laws has acted upon the matter, and we cannot go behind its action to inquire whether it acted rightly or wrongfully, justly or unjustly. It is the tribunal to which he submitted himself when he accepted membership of the congregation, and its action is not examinable in a civil court.

It will be observed that we assume, as we are obliged to do in the state of the pleadings and evidence in this case, that the church judicatory was properly constituted, and in the manner prescribed by the constitution and by-laws of the congregation. The return, not having been traversed by proof, nor excepted to for insufficiency, is taken as true for the purpose of testing the right to the peremptory mandamus, and that return avers and exhibits the constitution of the body which forms the judicatory, and which passed the sentence of excommunication. The State *ex rel.* Vierra v. Lusitanian Society, 15 Annual, 73. Tucker v. the Justices, 1 Jones (N. C.) 451. People v. Finqu, 24 Barb. 341.

The judgment of the lower court sustained the exception to the jurisdiction, and refused the peremptory mandamus. It is correct and is affirmed.

No. 6875.

THE STATE VS. SOLOMON PRITCHARD.

Where the lower judge rejects the evidence of a witness on the ground that she was, on her own uncontradicted testimony, the wife of the accused, he decides a question of fact, and his decision can not be reviewed by this court. If the woman were not really the wife of the accused, that fact should have been set forth in affidavits on an application for a new trial.

A PPEAL from the Fifth Judicial District Court, parish of East Baton Rouge. *McVea, J.*

H. N. Ogden for the State.

J. & G. W. Burgess for defendant.

The opinion of the court was delivered by

MARR, J. The accused moved for a new trial on the grounds :

1. That the verdict was contrary to the law and the evidence.
2. That he was deprived of the testimony of Belle Pritchard, a material witness. That the evidence was objected to by the district attorney on the ground that witness was the wife of accused, which objection was sustained by the court, when, in fact, it was shown by the same witness that she was not his wife.

The judge says : " When Belle Pritchard was sworn, the district attorney objected because she was wife of the accused. In answer to the court she said she was his accused's wife ; and was then ordered to stand aside. The court did not hear her state that she was not married to accused, and it was not asked that she be recalled to the stand. Although this fact may have been stated to counsel afterward, I am not able to say, as no testimony was adduced, although there was difference of opinion between counsel as to the fact."

The judge decided, as a matter of fact, on the objection of the district attorney, upon the testimony of the witness herself, that she was the wife of the accused ; and we have no power to review that decision. If, while she was on the stand, she had stated to the judge that she had not been married to the accused, but was living with him as his wife, and the judge had declared her to be incompetent as a witness, a legal question would have been presented, which we could review. What she may have said after she had been dismissed by the judge, and had left the stand, was not evidence : it was not heard by the judge, and was not considered or passed upon by him. If the counsel for accused had asked to have the witness recalled for further examination, in order to prove that she was not married to the accused, or had offered to prove by any competent testimony that she was not his wife, we might have reviewed the ruling of the court refusing to receive such evidence. All the proof that the judge heard was the statement of the woman, in answer to his question, that she was the wife of the accused ; and he therefore ordered her to stand aside. The testimony satisfied him that the objection of the district attorney was well taken, and he properly dismissed her as a witness.

If it had been true that she was not the wife of accused, and that her testimony would have been material, the affidavit of the accused, and of the woman herself, or of others having knowledge of the facts, might have been good ground for a new trial ; but no such showing was made, and no such facts were proven or passed upon by the court. The ruling of the court was that a woman, objected to as a witness on the ground that she was the wife of the accused, and who, after having been sworn, was interrogated by the judge, and answered that she was

State vs. Pritchard.

his wife, was not a competent witness in his behalf. If there had been a conflict of testimony we should be concluded by the decision of the judge; but there was no conflict. The judge heard no testimony except that of the woman; and he says no other testimony was adduced. The fact having been thus established, there can be no question as to the correctness of the decision that she was not competent.

The judgment appealed from is therefore affirmed with costs.

No. 7312.

THE STATE VS. ISRAEL MORRISON.

Where a party indicted for murder is convicted of manslaughter, and the conviction is set aside as an absolute nullity by this court, he can not be subsequently indicted and tried for the same offense, unless the indictment is found within a year from the time the crime is charged to have been committed. A criminal prosecution which has been declared a nullity does not interrupt prescription.

APPEAL from the Seventh Judicial District Court, parish of Pointe Coupée. Yoist, J.

H. N. Ogden, Attorney General, for the State.

R. Semple and Hewes & Parlange for defendant.

The opinion of the court was delivered by

MANNING, C. J. On an indictment for murder found December 16, 1878, which alleged that the crime was committed on January 29, 1877, a verdict of manslaughter was rendered against the defendant, whereupon he moved in arrest of judgment on the ground of prescription. On hearing, the State offered in evidence the records and documents of a previous prosecution for the same offence, for the purpose of shewing that such prosecution had commenced within a year from the commission of the crime. The evidence thus offered is the transcript of the case which was before us last year. *State v. Morrison*, 30 Annual, 817. Objection was made by the prisoner to the reception of this evidence on the ground that all the proceedings taken therein were null and had been so adjudged, which being overruled, he reserved a bill. Sentence of confinement at hard labour for twenty years was passed upon him, from which he appeals.

This presents the question whether a criminal prosecution which has been declared a nullity, interrupts prescription. It is apparent that it does not.

It has long been settled that when a prisoner is indicted for murder, and is convicted of manslaughter, the conviction is illegal if the indictment was not found within a year from the commission of the crime. *State v. Cobbs*, 7 Annual, 107. And in such prosecutions unless the

 State vs. Morrison.

State shews a previous indictment of the same person for the same offence, found within the year, or cause why such indictment was not found, such as the absconding of the offender, or that the commission of the crime had not been known to the authorities before, the conviction will not be sustained.

We lately held that when such prosecution had been commenced in time, and was afterwards voluntarily abandoned, the plea of prescription must prevail. *State v. Baker*, 30 Annual, 1134. And that the same result will follow if the previous prosecution is based upon a fatally defective information. *State v. Curtis*, *ibid.* 1166.

The first criminal proceedings against this defendant were declared by us to be absolute nullities. It is then as if he had never been indicted until as set forth in the present case, and this indictment was not found within a year from the time when the crime is charged to have been committed. The plea of prescription is good. Therefore

It is ordered and decreed that the judgment of the lower court is reversed, the verdict of the jury is set aside, and the prisoner is ordered to be discharged from custody under this prosecution.

 No. 7429.

SUCCESSION OF ELIZABETH LEBREW.

An action for the nullity of a judgment on account of matters in existence and known to the plaintiff when the suit was instituted in which the judgment was rendered, can not be maintained.

The fault of a co-defendant is not a ground for annulling a judgment.

A judgment recognizing certain parties as the legal heirs of their deceased grandmother, rendered in a suit against the surviving husband of their grandmother, who claimed under her will to be her universal legatee, may be pleaded as *res adjudicata* against him in a suit to annul the judgment brought by him in the assumed capacity of a legal heir.

The binding effect of *res adjudicata* can not be impaired by the fact that the thing established by it involves a question of public order, and is afterward found to be wholly untrue. The presumption that the thing adjudged is true is so conclusive, no subsequent discovery can disturb it.

A PPEAL from the Parish Court of East Baton Rouge. *Sherburne, J.*

R. W. Knickerbocker for Lebrew, appellant.

Sam P. Greves for heirs of Betz, appellees.

The opinion of the court was delivered by

WHITE, J. On the 21st of June, 1877, Henrietta Betz, wife, duly authorized, of Charles Fisher, with Edward and Lena Betz, minors, represented by their under-tutor, their tutor having an adverse interest, claiming to be the lawful children of Mary Witty, the issue of her mar-

Succession of Lebrew.

riage with Charles Betz, both deceased, instituted suit to annul the will, and probate thereof, of their deceased maternal grandmother, Mrs. Elizabeth Lebrew, on the following grounds :

First. That the will had never been executed by the deceased.

Second. That her signature was procured by fraud, she being at the time of its pretended execution of unsound mind.

Third. That by representation of their mother they were the sole legal forced heirs of the deceased, and that their rights as such were infringed by the pretended will, which instituted Frank Lebrew, their step-grandfather, universal legatee of their grandmother's estate.

They prayed for the annulment of the will and for recognition as the sole legal forced heirs of the deceased. Nicolas Wax, executor, and Frank Lebrew were personally cited, and answered by a general denial. On the 19th of January, 1878, judgment was rendered in favor of plaintiffs, recognizing them as the sole legal heirs of their mother, and she having been the only descendant of Mrs. Lebrew, her mother, they by representation as the sole legal heirs of their grandmother's estate. The will and probate were annulled.

On the 11th of February, 1878, Frank Lebrew sued to annul the judgment thus rendered against him on the following grounds :

1. That the heirs of Mrs. Lebrew knew at the time they presented their claim for recognition that they were not the lawful heirs of their mother and grandmother.

2. That he was prevented from urging their want of heirship by sickness and by the omission or fraud of his co-defendant, Nicolas Wax; that being confined to his room with sickness he requested Wax to send to him the counsel who had been retained to defend the suit, in order that he might inform him of the want of heirship in the plaintiffs; that Wax failed to do so, and hence the defense was not urged by counsel.

3. That the pretended children of Mrs. Betz were not her lawful issue, but were adulterous bastards.

4. That in consequence of such fact Mrs. Lebrew, his predeceased wife, had left no lawful descendants or collateral kindred, and he was hence her heir.

The defendants pleaded *res judicata* and a general denial.

Under these issues the controversy presents a twofold aspect: as to the nullity of the judgment, and as to being, if not null, the thing adjudged between the parties, of the matters presently at bar.

First. It is to be borne in mind that no attempt is made to annul the judgment in so far as it destroyed the will—the plaintiff now claiming as a legal, not as a testamentary heir. It is hardly necessary to say that the averment that the plaintiffs in the original suit knew that they were not lawful heirs at the time of their demand for recognition fur-

nishes no ground for an action of nullity; but if it did it is disproved by the record now before us. Plaintiff does not, so far as the other grounds go, ask the annulment of the judgment on account of matters not known to him at the time of the institution of the suit; but, on the contrary, admits his knowledge of every fact now urged at the time the original suit was brought. If any thing is settled in our jurisprudence, it is that one can not be heard by way of action in nullity to destroy a judgment for matters known and in existence at the time of the institution of the suit in which the judgment was rendered, even though by some neglect they may not have been pleaded. 1 R. 523; 18 L. 551; 3 A. 646; 6 A. 799. But it is said that by the neglect of Wax an opportunity was not afforded plaintiff to inform his counsel of the serious defense. We do not think the proof establishes the assertion, but if it did the conclusion would be the same. Wax was a defendant, and plaintiff's action to annul would resolve itself into a complaint of the neglect or omission of his co-defendant.

Second. The legal heirship of the defendants is clearly established by the presumption of the thing adjudged. All the elements of *res adjudicata* are to be found in the final judgment rendered between the parties. It is contended that Lebrew was originally sued as universal legatee, and hence the recognition of the plaintiffs in that suit as the sole legal heirs of the deceased while binding on him in such capacity is not in that of legal heir, which he assumes in this controversy. It is obvious that this is a mere evasion, and that the non-existence of this new quality in the present plaintiff was the very thing adjudged, for the sole legal heirship in the then plaintiffs is incompatible with the claimed legal heirship of the present plaintiff. We are told that if the defendants are adulterous bastards the recognition of their right to heirship would be a violation of public order, and hence such fact can be shown at any time despite the sanctity of the thing adjudged. The proposition is vicious, because the very matter established by the legal presumption is the legal heirship. In speaking on this subject Demolombe says: "But it may be contended that in case of a nullity founded on public order which a defendant could not renounce he can consequently urge it in a second suit, although not presented in the first. We reply that this distinction is inadmissible. * * * Because it is contrary to every principle. What! when a pleader has defended himself by every means, or even when he has been condemned by default, will it be said that the law will presume that he has failed to present his defenses? Certainly not. That which it presumes is that these defenses do not exist." * * * Resting our opinion as we do on the presumption of the thing adjudged, we deem it well to say that we do not even remotely indicate any opinion as to the facts shown by the record, so as to leave

 Succession of Lebrew.

room for any inference that we consider without reference to the legal presumption the proof establishes the success of this attempt on the part of plaintiff to bastardize his step-grandchildren in order himself to reap their grandmother's estate.

The judgment is affirmed, with costs.

 No. 5906.

JOHN M. HENDERSON, TRUSTEE, VS. CASE, RECEIVER OF THE CRESCENT CITY NATIONAL BANK.

An insolvent debtor who has under the bankrupt law made a composition with his creditors, may, in the absence of contrary stipulations, authorize an agent to sue for and collect his assets.

The purchaser of a dishonored bill, who buys it from one who is not the owner, and who is not authorized to sell, acquires no title as against the real owner.

A PPEAL from the Sixth District Court, parish of Orleans. *Saucier, J.*

Bayne & Renshaw for plaintiff and appellee.

John J. Finney for Clasen & Weiting, appellants.

The opinion of the court was delivered by

SPENCER, J. Plaintiff as assignee and trustee of the insolvent firm of Mallalieu & Co., of London, sues Case, Receiver of the Crescent City National Bank, and Arthur Clasen & Weiting, to have said firm of Mallalieu & Co. declared owners of a certain bill of exchange drawn by said Bank on Lizardi & Co., of London, for £1500. The plaintiff also demands judgment against the Bank for said sum.

Defendants Clasen & Weiting excepted to plaintiff's right to stand in judgment for Mallalieu & Co. This exception was referred to the merits. The answer is in effect a general denial of any right in plaintiff to the bill in question. There was judgment for plaintiff, as claimed, and Clasen & Weiting appeal.

There is no dispute about the facts. Mallalieu & Co. were, at the maturity of the bill, its owners, and it was protested for them as holders. They sent it, some time after protest, through Horstendahl & Co., of London, to Godfrey Borst, of New Orleans, to collect from the defendant bank, which in the mean time had suspended. Borst after a fruitless effort returned it to Horstendahl & Co., who passed it off, and it finally came into the hands of Clasen & Weiting, who do not allege or show how or for what consideration or from whom they took it. The evidence is conclusive that Mallalieu & Co. never parted with their ownership or authorized any one to transfer it for them.

Two questions are presented for our decision :

First—Has Henderson a right to sue? and,

Second—Does the purchaser of a dishonored note or bill from one not owner nor authorized to sell acquire a good title as against the true owner?

The first question we think must be answered in the affirmative. Mallalieu & Co. becoming insolvent made in the Bankruptcy Court of London a composition with their creditors, and thereupon assigned all their assets of every kind, by special act, to Henderson, with power to collect for benefit of themselves and their creditors. This was in effect making Henderson the agent of Mallalieu & Co. We have held that under our bankrupt law when a composition is made with creditors the debtor may, in the absence of stipulations to the contrary, sue for and collect his assets. Bayly & Pond vs. Stacey & Poland, 30 An. 1210.

If so, he may collect through an agent, and the mandate will be presumed to continue until the contrary is shown. We do not see that the mandate in this case is limited in the way defendants' counsel contends.

Second. The second question must, we think, be answered in the negative. It is no longer an open question that the *bona fide* holder, for value and before maturity, of a negotiable note or bill, indorsed in blank, will acquire a good title thereto against the true owner, though acquired from one without right therein. But this doctrine derives itself from the commercial law, and must be restricted to strictly commercial paper. After a bill or note is dishonored and past maturity it ceases to possess those extraordinary qualities with which the necessities of commerce have clothed it. It becomes then a mere *chose in action*, or ordinary obligation for the payment of money. It may be transferred by delivery, provided that the transferrer have right to do so. After dishonor it falls under the dominion of that fundamental rule of property, that "the sale of the thing of another is void." C. C.

This doctrine is fully recognized and maintained by the Supreme Court of the United States in *Foley vs. Smith*, 6 Wall. 493. That was a case almost identical with this, Mrs. Smith holding several notes of McHatten, indorsed in blank, and delivering one of them for \$15,000 to the Bank of Kentucky for collection. The Bank of Kentucky forwarded the note to the Citizens' Bank, at New Orleans, where it was protested. Subsequently, McKnight, the agent of the Bank of Kentucky, withdrew it from the Citizens' Bank and sold it by authentic act to Foley & Co. The court held that Foley & Co., having acquired *after maturity*, got no better title than their vendor, the Bank of Kentucky, had, and that the Bank had no title, and could transfer none. The court says truly that had the Bank transferred the note *before ma-*

turity the title would have been good against Mrs. Smith. Any other doctrine than here announced abrogates all distinction between negotiable paper taken before and after maturity. The same doctrine is announced and adhered to by that court in "Texas vs. White," 7 Wall. p. 700. We find nothing to the contrary in the late case of "Bank vs. Texas," 20 Wall. p. 88.

These views were expressed by this court in "Bird vs. Cockrem," 28 An. 70, where it was held that after the maturity of the notes a pledge of them without the knowledge or consent of the owner was invalid as to him.

We do not think that the authorities cited by defendant to the effect that "no collateral equities can affect an assignee of commercial paper transferred after maturity" can be applied to the case where there is a *total want of right* in the transferer.

At all events, and however this may be, we prefer to follow the line of authority which protects the owner of dishonored paper in such cases, as being more in consonance with our own Code, and, as we believe, in nowise conflicting with the interests of commerce.

The judgment appealed from is therefore affirmed with costs.

Mr. Justice WHITE takes no part in this decision.

No. 7131.

EDWARD LINN VS. EDWARD DEE ET AL.

The special mortgage executed by a tutor in favor of minors, in order to relieve his property from the general legal mortgage in their favor, does not import a confession of judgment for any specific amount, and hence does not authorize executory proceedings.

A third possessor evicted by a mortgage creditor can claim for his expenses and improvements only to the extent of the increased value of the property resulting from the improvements. If his expenses, incurred in making the improvements, are less in amount than the increased value arising from the improvements, he can recover only the sum of those expenses, and is liable for the fruits and revenues of the property from the moment he is notified of the order of seizure.

A PPEAL from the Sixth District Court, parish of Orleans. *Rightor,*
J.

Thos. Gilmore & Sons for plaintiff and appellant.

Bentinck Egan for defendants and appellees.

The opinion of the court was delivered by

DEBLANC, J. Edward and Henry Dee are the children of Martin Dee and Margaret Joyce, both deceased. At the death of their mother,

their father was confirmed natural tutor. In that capacity, he filed an account which was duly homologated, and—on the 17th of August 1869, to secure the balance shown by that account—he executed a special mortgage which contains the following recital :

“Now the condition of this special mortgage is such, that whereas the said Martin Dee has been confirmed and duly sworn as the natural tutor of his minor children, Edward and Henry Dee, the issue of his marriage with Margaret Joyce, deceased ; and, whereas, the rights and property of the said minors have been liquidated by a decree of the said Second District Court for the parish of Orleans bearing date the 5th day of August, 1869, in the sum of one thousand six hundred and seven 04½-100 dollars, as the whole will more fully appear by reference to the proceedings had in the succession of the said Mrs. Margaret Joyce, deceased wife of Martin Dee, No. 32,974 of the docket of said court—Second District, parish of Orleans,

“Therefore, if the said Martin Dee shall well and truly perform and faithfully discharge all his duties as natural tutor of the above named Edward and Henry Dee, his minor children, and each of them, and shall, at the expiration of said tutorship, render unto each of them a just, true, faithful and correct account of the share of each in the said sum of one thousand six hundred and seven 04½-100 dollars, and of all interest to accrue thereon, and if he shall be discharged in due course of law from his said tutorship, then this mortgage shall cease to have effect ; and if otherwise, it shall remain in full force and vigor up to the amount of and to secure the said sum of one thousand six hundred and seven 04½-100 dollars, and twenty-five per cent thereon, and for the share of each of said minors in said sum and interest as aforesaid ; and the said Martin Dee binds himself not to alienate, deteriorate or encumber the said property to the prejudice of this mortgage.”

On the 20th of August 1869, Martin Dee mortgaged in favor of George W. Doll, to secure a loan of five thousand dollars, the same property which—three days before—he had mortgaged to secure the rights of his wards and the faithful discharge of his duties as tutor.

Martin Dee died in November 1869, and—on the 30th of August 1870—the executor of his will filed a petition in which he represented that his succession was very much in debt, and that a sale of the property thereto belonging ought to be made to satisfy its liabilities. The sale was ordered by the court, and—on the 31 of October 1870—the property specially mortgaged to Edward and Henry Dee and—subsequently—to George W. Doll was adjudicated to the latter for fifteen hundred dollars, which—according to the condition of the sale—were to be paid cash, but which—less a fraction—the adjudicatee retained in his hands and applied in part payment of his own claim.

On the 21st of October 1870, Edward Linn—the plaintiff—purchased from George W. Doll, for three thousand dollars, the property so adjudicated to his vendor, and his and his vendor's title were duly recorded. On the 20th of December 1876, in a proceeding by rule instituted against George W. Doll alone, in the Second District Court, the title transferred by him to plaintiff and which he had—apparently at least—acquired on the 3d of October 1870, was set aside and annulled.

On the 18th of May, 1877, ignoring plaintiff's title, defendants obtained from the Sixth District Court of the parish of Orleans, a writ of seizure and sale against the property which—more than six years before—had passed from Doll's possession into that of Edward Linn, who opposes the execution of said writ on the grounds :

1. That defendants' special mortgage was extinguished by the sale of October 1870, and their rights transferred from the mortgaged property to the proceeds of that sale.
2. That the act by which said mortgage is evidenced does not authorize proceedings *via executiva*.
3. That—if the mortgage exists—plaintiff, as a purchaser in good faith—is entitled to compensation for his improvements.

I.

Had George W. Doll paid the price of the adjudication made to him on the 3d day of October 1870, there can be no doubt that said adjudication would have transferred, from the property to the proceeds of the sale, the rights which defendants could previously have exercised against the property itself ; but Doll did not comply with the conditions of the sale, refused to pay the price of the adjudication, and did not even attempt to oppose or resist the decree by which his title was cancelled. As to him, that decree remains in full force ; but as it neither did nor could impair the title of Edward Linn, who was not a party to the action in nullity, and who—so far as we are informed by the transcript—acquired in good faith from George W. Doll, we refrain from expressing any opinion on either the failure and refusal of the latter to comply with the conditions of the adjudication of the 3d of October, or the effects of the decree by which it was annulled.

II.

Did the defendants' rights arise from an act importing a confession of judgment, and could they have resorted to the executory process ? An appeal would have been the proper remedy to test this question—25th A. 80, 26 A. 709. As, however, this objection is—not only not urged, but inferentially waived by the answer to plaintiff's injunction, we proceed to examine and decide it.

What are the objects of a special mortgage, such as that given by Martin Dee in favor of his minor children ? To secure the rights and

property of said children, the faithful discharge of the tutor's duties, and—mainly—to release from the legal and general mortgage arising from the tutorship, the whole of the tutor's property not affected by the special mortgage. R. C. C. 325.

When such a mortgage is given to secure the rights of two or more minors, in what way must it be enforced? "On attaining the age of majority, or being emancipated, any one of the mortgagees, may proceed to the sale of the property mortgaged, after having discussed the other property of the debtor, in the manner following:

"A family meeting shall be convened on behalf of the remaining minors to consider whether the property mortgaged is sufficient to satisfy all demands on it, in favor both of the major and minor heirs. If they should be of opinion that the property is sufficient to satisfy all demands, they shall advise that so much of the property mortgaged as will satisfy the demand of the major be sold—if susceptible of division—and the property then sold shall be free from the mortgage in favor of the remaining minors."

"If the meeting shall be of opinion that the property mortgaged is not sufficient to satisfy the demands of all the heirs, or that it is not susceptible of division, the whole of the mortgaged property shall be sold, and shall be released from the mortgage in favor of the major and minors, etc." R. C. C. 333.

In this instance, though one of the mortgagees is still under age, these formalities were not complied with, and if required in an action against the tutor and whilst the mortgaged property is still in his possession, they should certainly precede an action against a third possessor.

Nor is this all: the expenses for the support and education of a minor should never exceed, but may and do often absorb his revenues, and the final account which the tutor or his legal representatives are bound to give of his administration at the expiration of the tutorship, can alone conclusively fix the amount due by him to his wards. As to them and to third parties, the judgments homologating either his annual accounts or the liquidation which precedes the execution of the special mortgage which he is allowed to give in lieu of the general mortgage arising from the tutorship, are but *prima facie* evidence of the correctness of the homologated accounts—R. C. C. 356, 357 (350); and as they do not import a confession of judgment for any finally determined amount, neither the annual accounts nor the liquidation referred to can be the basis of an executory proceeding and authorize the issuance of a writ of seizure and sale.

III.

In order to reduce the chances of a procrastination of this contro-

Linn vs. Dee et al.

versy, we consider it proper to state that a third possessor evicted by a mortgage creditor can claim, for his expenses and improvements, only to the amount of the *increased value* which is the result of the improvements made. That increased value is the difference between what the immovable would be worth on the day of the adjudication and eviction under the seizure, if the improvements had not been made, and the price which it brings with the improvements. When the expenses incurred by the third possessor are less than the increased value, he can then recover but an amount equal to his expenses and not one equal to the increased value: but—from the date of the service on the third possessor of the notification of the order of seizure, he is liable for the fruits and income of the mortgaged property.

C. N. 2175 ; C. C. 3408. (3371).

Gilbert, Codes Annotés, p.p. 1006-1007.

It is, therefore, ordered, adjudged and decreed that the judgment appealed from is annulled, avoided and reversed, and plaintiff's injunction perpetuated at the costs of defendants in both courts.

Rehearing refused.

No. 7390.

JOHN O'CONNOR VS. PARISH OF EAST BATON ROUGE.

The owner of parish warrants who surrenders them to the parish in exchange for bonds of the parish which turned out to be void, acquires no right of action for damages against the parish because the warrants had been destroyed by the parish, to the knowledge and with the tacit consent of the owner. A suit on the destroyed warrants to recover their amount is the form of action proper in such a case.

The payment of parish warrants issued on account of commissions on suits prosecuted or defended for the parish by a district attorney *pro tempore*, when sued on by a third person, who holds them merely as pledgee of the district attorney *pro tem.*, may be resisted on the ground that the services for which the warrants issued were not rendered, or were inefficiently rendered. But the payment of the salary of a district attorney can not be resisted on the ground that he was inefficient or without learning.

A PPEAL from the Fifth Judicial District Court, parish of East Baton Rouge. *McVea, J.*

Sam'l P. Greves for plaintiff and appellant.

Thos. B. Dupree, parish attorney, for defendant and appellee.

The opinion of the court was delivered by

SPENCER, J. Plaintiff sues the parish of East Baton Rouge.

First—In damages for the amount of certain parish warrants which he surrendered to it, in exchange for an equal amount of five-year parish bonds. He alleges that the parish in 1871, in order to take up its floating indebtedness, executed its bonds, payable in five years,

to bearer; that he, holding \$550 of said floating debt, exchanged the evidences thereof for said bonds—which said evidences of indebtedness were by ordinance of the police jury canceled and burned; that in a certain suit against the parish said bonds were subsequently decreed to be null and void; that thereby petitioner was “evicted” of the thing *received* in exchange, and as the thing *given* in exchange has been destroyed, he is entitled to recover damages, which he lays at the sum of \$550.

Second—For the amount of sundry parish warrants held by him, and amounting to \$1877 03.

The answer of the defendant denies generally plaintiff's allegations. It is specially denied that G. A. Griffith (in whose favor the larger part of said warrants were issued, for salary and services as district attorney *pro tem.*) was an attorney at law, or ever authorized to practice as such by competent authority in this State. It is averred that he was totally ignorant of and incompetent to discharge the duties of district attorney *pro tem.*, and was in fact a mere “figure-head,” rendering no service, and capable of rendering none. That other attorneys had to be employed and paid, and that there was no consideration for the warrants in favor of Griffith.

The case was tried by jury, who returned a verdict for plaintiff, for certain items amounting to \$245 45, and rejected the balance of the claim.

First—As regards the claim for damages, we think it, under the facts stated, not sustainable either in principle or in equity. Plaintiff held certain warrants of defendant. He voluntarily gave them up to his debtor, and took bonds. It was reasonably certain and must have been, at the time, contemplated by the parties, that the parish authorities would cancel and destroy these warrants. The plaintiff himself, as shown by the record, was chairman of the finance committee of the police jury, and as such reports that he and his committee had burned them all. *Volenti non fit injuria*, is an old maxim which applies with peculiar force here, since the plaintiff not only *consented* to the destruction, but was himself the instrument by which it was accomplished.

But on principle, an action in damages is not the proper remedy to recover a sum of money due, the evidence of which has been lost or destroyed. The obligation to pay a sum of money must not be confounded with the instrument evidencing that obligation. The latter may be destroyed without in anywise affecting the former. The transaction was in reality an attempted novation, by the substitution of a new obligation. If this last was null and void, it did not extinguish the old one, which continued to exist, notwithstanding the destruction of the written evidence of it. Plaintiff should have sued upon the original obligations, alleging the loss or destruction of the evidence of them.

He could thereby resort to parol evidence of the existence, verity, and legality of his claim, and have demanded judgment therefor. We find in the record no such evidence.

Second—Of the warrants sued upon we think, under the pleadings and evidence, the jury were justified in rejecting those in favor of Griffith, who it appears is still their owner, but has put them in plaintiff's hands as collateral.

It was specially denied in the answer that Griffith was an attorney at law. If not, he could not be district attorney *pro tem*. The testimony of a number of attorneys was taken, who stated him to be ignorant and incompetent. This was a sufficient *prima facie* showing on the part of defendant of his not being an attorney to overcome any presumption resulting from Griffith's acting in that capacity. It then became plaintiff's duty to administer affirmative proof that he was a duly authorized attorney at law. This he did not do or attempt. So far as the salary proper of the district attorney *pro tem*. is concerned, we do not think it a legitimate or admissible defense that he was inefficient or without learning. But as relates to his commissions on suits prosecuted or defended by him for the parish, we see no reason why his claim could not be resisted on the ground that the services were not rendered, or were inefficiently rendered. It is shown that the services claimed to have been rendered by Griffith in these suits, for which he was allowed a commission of five per cent, were rendered in fact by other attorneys employed and paid by the parish.

We think, therefore, that the claim of \$550 damages, and the Griffith warrants, were properly rejected. But the evidence satisfies us that the other warrants and claims sued upon are legal debts of the parish. The Griffith warrants sued upon amount in the aggregate to the sum of \$1246 61, which deducted from \$1877 03 leaves \$630 42 due plaintiff. The judgment below allowed interest only from date of verdict. This was error. It should have been from maturity of the warrants.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be amended, by increasing the amount thereof to six hundred and thirty 42-100 dollars, and by allowing interest at five per cent per annum on said sum, as follows :

On \$10 thereof from October 3, 1871; on \$70 thereof from July 6, 1872; on \$5 thereof from September 3, 1873; on \$8 thereof from September 12, 1873; on \$100 thereof from April 13, 1875; on \$250 thereof from November 6, 1875; on \$75 thereof from January 7, 1876; on \$48 25 thereof from June 16, 1876; on \$13 90 thereof from July 17, 1876; on \$1 thereof from October 6, 1876; on \$29 10 thereof from December 1, 1876; and \$20 thereof from December 28, 1876. That as thus amended said judgment is affirmed at costs of the defendant and appellee in both courts.

Widow de St. Romes vs. Levee Steam Cotton Press Company.

No. 5900.

MRS. WIDOW J. C. DE ST. ROMES VS. THE LEVEE STEAM COTTON PRESS CO.

In the absence of the Judge of one of the District Courts of the parish of Orleans, another district judge of that parish may grant an appeal from a judgment rendered by the absent judge.

A motion to dismiss an appeal taken after the lapse of three days from the filing of the record in this court is too late.

This court will, notwithstanding the acquiescence of the appellant in the judgment he has appealed from, proceed with the case, on the demand of the appellee, and change, or confirm the judgment for the latter's benefit.

The possession of shares in the stock of a corporation for three years, in good faith, and under a title translatif of property; or their possession for ten years without good faith, or title, acquires the ownership of the shares by prescription.

A PPEAL from the Superior District Court, parish of Orleans. *Hawkins, J.*

Charles Louque for plaintiff and appellant.

Edward Bermudez and *Charles E. Schmidt* for defendant and other appellees.

ON MOTION TO DISMISS.

The opinion of the court on motion to dismiss was delivered by MORGAN, J., and on the merits by SPENCER, J.

MORGAN, J. On the sixteenth November, 1876, judgment was rendered by the judge of the Superior District Court dismissing plaintiff's demand.

On the seventh October, 1875, she presented a petition addressed to the Superior District Court asking for an appeal from the judgment above recited. The order of appeal was granted upon her giving bond in the sum of three hundred dollars. The order of appeal was signed by "A. L. Tissot, judge of the Second District, acting in the absence of Jacob Hawkins, judge."

Appellees move to dismiss the appeal on the grounds:

First—That no order of appeal was rendered by the judge of the Superior District Court by whom the judgment complained of was rendered, and who alone could grant the same.

Second—Because the judge of the Superior District Court could be replaced by an attorney or by another judge only in those cases in which he was recused or interested.

Third—Because the judge of the Superior District Court was neither recused nor interested in this case, and properly tried and decided it.

Fourth—There exists no legal enactment authorizing a judge to act in the place of another in any other case, and that if any law is claimed to exist, it is unconstitutional and void.

Widow de St. Romes vs. Levee Steam Cotton Press Company.

The four propositions, as above set forth, are in fact reduced to the following question:

In the absence of the judge of one of the district courts for the parish of Orleans, can another district judge for the same parish grant an appeal from a judgment rendered by the absent judge?

The thirteenth section of the act of 1855, No. 255, p. 317, provides that it shall be the duty of each of the judges of the district courts of Natchitoches, commencing with the judge of the first district court, to hold alternately during one week the court which any one of the judges may be incapacitated from holding by reason of illness or by leave of absence.

Judge Hawkins, the judge of the Superior District Court, was absent when the appeal in this case was asked for. Judge Tissot acted in his place. We will assume that he was acting under the authority of the statute above quoted. He was therefore competent to grant the appeal.

Other grounds are urged why the appeal should be dismissed, but they were set up more than three days after the record was filed here. The motion came too late.

Motion to dismiss is denied.

DISSENTING OPINION ON MOTION TO DISMISS.

TALIAFERRO, J. Numerous grounds for the dismissal are stated; the more prominent of which are the following:

First—No order of appeal was rendered by the judge of the Superior District Court by whom the judgment complained of was rendered and who alone could grant the same.

Second—The judge of the Superior District Court could be replaced by an attorney or by another judge only in those cases in which he was recused or interested.

Third—That the judge of the Superior District Court was neither recused nor interested in this case, and properly decided it.

Fourth—There exists no legal enactment authorizing a judge to act in the place of another in any other case, and if any law is claimed to exist it is unconstitutional and void.

Fifth—Under no circumstances, except a constitutional provision, which is not to be found, could the General Assembly authorize the judge of the Second District Court of the parish of Orleans, a court of limited and probate jurisdiction, to act in the absence of and for the judge of the Superior District Court for the parish of Orleans, which has exclusive jurisdiction of certain persons and matters.

Sixth—The judge of the Second District Court, who made the order of appeal, was not the *de facto* judge of the Superior District Court, and

Widow de St. Romes vs. Levee Steam Cotton Press Company.

did not claim to be the judge thereof, as, on the contrary, the order is issued by him as judge of the Second District Court merely acting in the absence of the judge of the Superior District Court.

Seventh—The judge of the Second District Court could not have passed on the matters involved in this case had they been presented to him as judge of the Second District Court, and could not have exercised in the Superior District Court functions and powers as the acting judge of said court which he did not possess as the judge of the Second District Court.

The question presented by this motion is, was the judge of the Second District Court competent, in the absence of the judge of the Superior District Court, to grant the order of appeal that he did grant from a judgment rendered by the judge of the Superior District Court? I have been at some pains to examine the constitutional and statutory provisions which relate to the powers, duties, and functions of district judges, and have not succeeded in finding any warrant of law *now in force* to authorize an answer to this question in the affirmative. I find no law that sanctions the exercise vicariously by judicial officers *inter sese* of the functions appertaining to the judicial office. In cases of recusation for lawful cause, and also in case of interest in the suit, the judge before whom the suit is brought is disqualified and declared incompetent to try it. The State constitution, article ninety, provides that in the former case the judge shall appoint an attorney at law having the qualifications of a judge of his court, to try such suit, and in the latter case he shall call in the parish or district judge, as the case may be, to try it. But in proceeding to hear and determine the case, the judge or attorney called in is not exercising functions which the recused judge might legally exercise; on the contrary, he is called to preside for the very reason that the recused functionary is wholly without jurisdiction of the particular matter presented. But, in the case before us, when the judge of the Second District Court granted the order of appeal he performed an act which the judge of the Superior District Court was in no manner incapacitated to perform. No question arose as to his competency. The action taken by the judge of the Second District Court arose solely from the absence of the proper judge, and to facilitate proceedings; assuming, as it were, to represent the absent judge and perform his functions as an accommodation to him and to prevent delay to parties litigant in his court.

The interchange system between district judges, which formerly existed under the act of March 15, 1855, if it could have been construed as conferring upon the judges the power of alternately performing the duties of each other, never had any application to the district judges of the parish of Orleans, being exclusively confined to the country dis-

Widow de St. Romes vs. Levee Steam Cotton Press Company.

tricts. The State constitution, article eighty-three, directs that for each district court one judge, learned in the law, shall be elected for each district by a plurality of the qualified electors thereof. In respect to the seven district courts established by this article of the constitution for the parish of Orleans, we find that the first has exclusive criminal jurisdiction, the second exclusive probate jurisdiction, the third exclusive jurisdiction of appeals from justices of the peace; the fourth, fifth, sixth, and seventh exclusive jurisdiction in all civil cases except probate, when the sum in contest is above one hundred dollars, exclusive of interest.

In the organization of the courts, the principle of exclusiveness and distinctness in the exercise of the powers conferred upon them seems to have been steadily kept in view, and I think no fair interpretation of the constitutional provisions on the subject, as well as the enactments of the General Assembly bearing on the same subject, will justify the conclusion that a judge of any district court may legally take judicial action in a case pending in a court other than his own when the proper judge of that court has jurisdiction of the case, and is under no legal disability to try and determine it.

There did exist, prior to the adoption of the constitution of 1868, and the statutes regulating courts under it, a provision of law authorizing this alternative jurisdiction by the judges of the district courts of New Orleans. Section 13 of act No. 255 of the acts of 1855 provides that "it shall be the duty of each of the judges of the district courts of New Orleans, commencing with the judge of the first district court, to hold alternately during one week the court which any one of the judges may be incapacitated from holding by reason of illness or by leave of absence." This act No. 255 of the acts of 1855 was approved on the 14th March, 1855. But the thirteenth section of this act is repealed by the act of 1870, entitled "an act to prevent conflict of jurisdiction between the several courts of this State and to punish the same." The first section of this act provides "that whenever a suit or a judicial proceeding is instituted in any of the courts of the parish of Orleans, in this State, where such court has jurisdiction, all parties to such suit shall be confined exclusively to such court for the trial of all issues or matters that may arise in the course of such litigation, or out of the judgment rendered in such litigation; and no other judge shall have jurisdiction to grant orders of injunction, sequestration, provisional seizure, arrest, prohibition, *quo warranto*, or any other order by which the proceedings in such litigation or judgment rendered therein, or the property in litigation, or persons of the parties in the litigation, shall be stayed or in any manner interfered with or interrupted; nor shall any other judge grant any of the above orders in favor of any party not a party to such

Widow de St. Romes vs. Levee Steam Cotton Press Company.

litigation or judgment, claiming to have an interest therein or to be affected thereby; but that all such orders shall be granted by the judge before whom the original suit or judicial proceeding was instituted; provided, that no provision in this section shall apply to the Supreme Court or the judges thereof." The provisions of this act of 1870 being plainly inconsistent with the thirteenth section of the act of 1855, before referred to, the latter is repealed.

I therefore conclude the motion to dismiss ought to be sustained.

Chief Justice LUDELING concurs in the dissenting opinion.

ON THE MERITS.

SPENCER, J. Plaintiff sues the Cotton Press Company to have herself declared owner of sixty-six shares of the stock of said company and for dividends accrued thereon. She also joins as defendants, Cohen, Miltenberger, and others, to whom said shares had been transferred in 1853, through one P. Deverges, acting as plaintiff's agent. This suit was filed in 1871.

The defense is a general denial, and the prescription of three and ten years.

The court below sustained the plea of prescription and rejected plaintiff's demands. She appealed.

In this court plaintiff has filed a paper, reciting that this suit was brought by her in error—inasmuch as she finds, from documents in the record, offered by defendants, that she had in 1867 transferred to Eugene de St. Romes her rights in a suit then pending in this court, wherein she was claiming these same shares. She therefore suggests that she has no interest in the matter, and her counsel asks that the suit be dismissed. The defendants oppose the dismissal, and demand that the case "take its course," as provided by article 901 C. P., which forbids the appellant withdrawing a perfected appeal without the consent of appellee. Under these circumstances, we can not permit the appeal to be withdrawn or dismissed. An appellant may undoubtedly, at any time, *acquiesce* in the judgment appealed from; but the effect of that acquiescence only operates to prevent any change in the judgment, *for the benefit of appellant*. The court may, notwithstanding the appellant's acquiescence, on the demand of appellee, proceed with the cause, and change or confirm the judgment for the benefit of appellee.

On the merits, there is but one question requiring decision, to wit, that of prescription. Plaintiff herself alleges, and it is proved, that Cohen and his transferees have held and possessed these shares since 1853, under a transfer from one assuming to act as her agent. Her

Widow de St. Romes vs. Levee Steam Cotton Press Company.

former suit, above referred to, was filed in 1861, and she did not make Cohen or those claiming under him parties. That suit, which resulted in a nonsuit, did not interrupt therefore the prescription running in their favor.

"Shares or interests in banks and other companies of commerce or industry are considered as movables." C. C. 466.

Three years in good faith, except where the thing was lost or stolen, gives a prescriptive title to movables. C. C. 3472. Ten years, without title or good faith. C. C. 3475. The defendants possessed under a title, and presumably in good faith, for eighteen years before this suit was brought.

The judgment appealed from is correct, and it is affirmed.
Rehearing refused.

No. 7235.

ANTOINE LANATA VS. CHARLES BAYHL.

An appellant who is unable to furnish an appeal bond will be allowed, in place of the bond, to deposit with the clerk of court granting the appeal the amount of the bond fixed by the court.

One who buys a negotiable note after its maturity takes it subject to all of the defenses that could be pleaded against his assignor.

Where a factor takes the promissory note of his debtor for money due, and for advances to be made, and thereafter indorses and discounts the note and credits its maker with the proceeds, he does not, by subsequently taking up the note and debiting its maker with the price of taking it up, thereby extinguish the note, either by payment or by novation. He remains the owner of the note, capable of transferring a valid title to it.

Where a debtor executes his promissory notes to his factor in order to cover advances due and to become due, the fact that the aggregate sum of the notes is something larger than the sum then exigible, will not impair the valid consideration of the notes, or convert them from principal into merely accessory debts.

APPPEAL from the Second Judicial District Court, parish of Plaquemine. *Pardee, J.*

Emile Legendre and Victor Okvier for plaintiff and appellant.

E. Howard McCaleb for defendant and appellee.

The opinion of the court on the motion to dismiss was delivered by MARR, J., and on the merits by WHITE, J.

ON MOTION TO DISMISS.

MARR, J. Antoine Lanata prayed for an appeal from the judgment of the District Court of Plaquemine parish, against him, in favor of defendant. The court granted the appeal with the condition that appel-

lant should give bond "with a good and solvent surety," in the sum of \$150.

Shortly after Lanata filed a petition, stating that he was unable to give bond with a surety residing in the parish; and that he desired to deposit the amount in the hands of the clerk of the court. The order was accordingly granted, authorizing the deposit to stand in lieu of the bond with surety previously ordered by the court to be given by appellant.

Appellee, admitting the deposit of the \$150 with the clerk, in compliance with this order of the court moved to dismiss the appeal for want of a bond.

The Code of Practice requires the appellant to give bond with a good and solvent surety; and it makes no provision for the case in which the appellant may be unable to give such bond. But article 3034 of the Civil Code, 3065 of the R. C. C., provides specially for all cases in which a person bound by law or by a judgment to give a surety is unable to give such surety. The first clause of the article permits him to give a pledge or other sufficient security; and the last clause authorizes him "to deposit in the hands of the public officer, whose duty it is to receive the surety, the sum for which he is required to furnish a surety."

Where there is conflict between the Civil Code and the Code of Practice, the latter must prevail: and this rule was applicable to the original Civil Code and Code of Practice, as it is now to the Revised Civil Code and the Revised Code of Practice. But is there any conflict between the Civil Code and the Code of Practice in this respect? The Code of Practice is the law by which appellant is bound to give a surety; and it contains no provision, for it does not contemplate the case in which the appellant, or other person bound by law or by a judgment to give a surety, finds himself unable to meet this requirement. That which is a *casus omissus* in the Code of Practice is supplied by the Civil Code.

When we find two enactments, two laws, differing, we are not at liberty to disregard either, unless they not only differ but are also in conflict. The Code of Practice, which contemplates and provides for the cases only in which the appellant is not unable to give bond with a surety, does not conflict with the Civil Code, which contemplates and provides, specially, for every case in which a person bound by law or by a judgment to give a surety, finds himself unable to comply with this obligation.

The Code of Practice, originally, required of the appellant bond with a surety; and the Civil Code, originally, under the head of "Legal and Judicial Sureties," provided for the inability of any person to give a surety required by law or by a judgment. The Legislature, by the adoption of the Revised Code of Practice and the Revised Civil Code,

Lanata vs. Bayhi.

has expressed its will that the law, as laid down in the Code of Practice, requiring the appellant to give bond with a surety, shall continue in force; and that the law, as laid down in the Civil Code, by which those who are unable to give a surety shall be dispensed with doing so, shall also continue in force. The Code of Practice, therefore, must be restricted to the cases in which the appellant is not unable to give a surety; and the Civil Code must be held to apply to all those cases in which the person bound by law or by a judgment to give a surety is unable to give such surety.

The Code of Practice, as amended, requires appeal bonds to be made payable to the clerk of the court. He is, therefore, the public officer whose duty it is to receive the surety. He receives the sum deposited by the appellant in his official capacity; and he and his sureties are responsible for the safe keeping of and for the faithful accounting for the sum so deposited, in the same manner as they are answerable for the performance by him of any other official duty.

The motion to dismiss is denied.

ON THE MERITS.

WHITE, J. Bethancourt was a commission merchant in New Orleans, Bayhi a planter in the parish of Plaquemine. Bethancourt made advances to Bayhi for the years 1871 and 1872. On the 26th of February, 1873, Bayhi, by act before Bouny, notary public, declared that "for the purpose of paying the expenses incurred during the year last past, 1872, and to be incurred during the present year, for the cultivation of his plantation, situated in the parish of Plaquemine, he has agreed to contract a loan of the sum of fourteen thousand dollars, and that in order to represent the amount of said loan, which is advanced by Mr. John Bethancourt, of New Orleans, he has made and subscribed five certain promissory notes to his own order, and by him indorsed, dated this day and payable at the New-Orleans National Banking Association in this city at the following periods, to wit:

"One for the sum of \$3750, due on the 1st of December, 1873;

"One for the sum of \$2500, due on the 15th December, 1873;

"Two for the sum of \$2500 each, due on the 1st and 15th days January, 1874; and

"One for the sum of \$2750, due on the 25th day of January, 1874."

For the security of these notes he mortgaged his plantation and obligated himself to ship his crops to the merchant, the proceeds to be applied to the extinction of the notes. On the 7th of April, 1877, the plaintiff brought the present suit on two of these notes, and the defend-

ant urged substantially the following defenses, which ultimated successfully in the lower court :

1. That plaintiff acquired the notes sued on at a sheriff's sale after maturity and is hence subject to all equities.

2. That the notes had been extinguished by payment and by merger or novation.

3. That they were given simply as collaterals to secure future advances to be evidenced by an account, and were therefore only accessories to a principal obligation which is extinguished, and if not extinguished of which the plaintiff is not the owner, and therefore prevented from demanding the accessory when he has no right to the principal obligation.

We will examine these defenses *seriatim* :

First. It is beyond doubt that Lanata, the present plaintiff, bought the notes at sheriff's sale, after their maturity, the sale having been made under an execution issued against Bethancourt. Under these facts, he acquired only Bethancourt's rights, and in passing on the questions of law and fact arising in the controversy we shall apply the law just as if Bethancourt were plaintiff, giving to the present plaintiff no greater rights than Bethancourt could himself enforce.

Second. The alleged payment and novation results from the fact that Bethancourt during the year 1873 discounted the notes in controversy and credited the defendant's account with the proceeds and when taking them up at maturity debited the account with the amount. It is urged that the debiting of the amount indicated that the payment was made by Bethancourt as agent of defendant. We do not so think. Bethancourt was indorser of the notes. He had a right to pay them. He had an interest in paying them. Not only this; but by the fact of payment he was legally subrogated. C. C. 2661; Millaudon vs. Colla, 15 L. 213; Suarez vs. His Creditors, 3 L. 431.

But it is contended that even if this conduct does not show payment of the account it establishes novation of the notes by the account. How, it is said, could the amount paid by Bethancourt be debited unless that debt which represented the note entered into the account and carried necessarily the note with it? The notes were Bethancourt's; they had been given him not only for future advances but for money stated in the act of mortgage to be actually due. He had credited the defendant with the proceeds of the notes, and obviously when the notes were taken up the debiting of the amount simply balanced the credit, leaving both parties in the exact position in which they were before any entry in the books on the subject, Bethancourt remaining the holder of the notes as originally issued to him by the defendant, Bayhi remaining the debtor for the

sum which had been placed to his credit obtained from Bethancourt's property.

That the mere credit of the proceeds of a note and subsequent debit of the amount does not *per se* operate a novation has been long determined by this court. Said Mr. Justice Bullard in *Yard & Blois, Syndics, vs. Srodes*, 9 L. 479: "The defendant was really indebted to that house at the time in perhaps a larger sum, and if he had paid the note would have been entitled to a credit for that amount. * * * It is said that as soon as the note was returned it formed nothing more than an item in the account, so that Shall, Cantrell & Co. could not transfer a part of that account so as to divide their action against the defendant; but it is obvious that at least the note itself formed the best and perhaps exclusive evidence of an existing debt. Such an entry did amount *per se* to a novation."

We are referred to a list of decisions by this court stated as being in conflict with the foregoing doctrine. We have examined them and do not so think. They hold that where notes are given for the accommodation of a factor and after discounting them, their mission, when taken up by him, being accomplished, they are extinguished; or, as in the case of *White vs. Rucker*, 9 An. 114, that where the amount remaining due is less than the note an intention to novate the note by the account may be presumed. Such is not the case here. The notes were given for an existing and valid consideration, and even as to future advances were given not simply as an accommodation; but as evidence of a loan to be made for the future. The terms of the act of mortgage are express. It is said that although the notes purported to be for an existing consideration such was not the case; that no debt existed at the time, and that the notes were merely for Bethancourt's accommodation. The language of the act of mortgage is unequivocal to the contrary. We are told, it is true, that although the act of mortgage purported to be in part for money due for advances made in 1872 there was nothing due for 1872. It is said the account for 1872 begins with a debit for \$13,652 63 carried forward from previous years, and ends after the application of the crops of 1872 with a debit of only \$13,504 40; therefore the debit at the end of the year being smaller than that carried forward at the beginning obviously no debt for advances existed in 1872, and therefore none was in existence when the act of mortgage was consented. This is a plain misconstruction. When the mortgage was consented, in February, 1873, the account for 1872 had been rendered the defendant. The common language of merchants is to state items charged in the account of the year as advances of that year; and, therefore, when the parties said that the mortgage was consented to secure the advance of 1872 we consider it evident that they intended to mean not simply the advances made in

1872; but those charged in the account of 1872, which had then been rendered. To hold the contrary, would be to say not only that Bethancourt, a merchant, accepted a mortgage in his favor to secure a debt not in existence when there was a debt actually due him, but also that the defendant mortgaged his property for a debt which he knew had been paid at the time of the mortgage. A construction leading to a presumption so full of intrinsic contradictions can not be correct. We think, to say the least, that the mortgage was a clear admission to the effect that the sums to the credit of the account were to be imputed to the amount carried forward from previous years, leaving the balance to the debit as really a debt due for advances made in 1872.

Third. The notes having been given for an existing consideration, and as evidence thereof, it is obvious that they were the evidence of a principal obligation. True, that at the time of the consenting of the mortgage the debt was only \$13,504, and the mortgage and notes were for \$14,000; but the existence of this small overplus could not destroy the existing and valid consideration.

The statement that at the time the last note sued on herein was paid and debited to defendant's account there was a sufficient sum to the credit of the account to have paid it is incorrect. Even had there been, Bethancourt would have had a right to first apply the proceeds of the crop to the sum due him for advances of that year, for which he was a privileged creditor.

But even were we to accept the theory of defendant, that the notes were given to secure the final balance of account between the parties, the result would be the same, for the final sum due by the defendant in 1873, after crediting the proceeds of the crop of 1873, exceeded the total of the mortgage notes originally given. When the accounts were closed in 1873 there was to defendant's debit \$8624 76; but he had been in the account credited with the proceeds of all the mortgage notes and debited only with the two now sued on. In order, therefore, to ascertain the exact result of the operations of 1873, we must add to the debit side of the account the face value of the outstanding notes which had been credited and not debited. So doing, we have a final debit of \$16,424 76, an amount more than sufficient to cover the whole of the mortgage notes, greater than the amount carried forward from the previous year. We do not understand that where notes are furnished to secure a future loan the notes become an accessory obligation. Of course, where *eo nomine*, as was the case in *Durrive vs. Key*, 20 A. 154, an account is made a prerequisite to recovery, the contract is a law unto itself. The non-existence of consideration in a case like the one now before us would be a means of defense. We need scarcely say that the obligation evidenced by the notes is not barred by three years, and that even if

Lanata vs. Bayhi.

the notes were collaterals, their existence alone would be an impediment to the acquisition of prescription.

It is therefore ordered, adjudged, and decreed that the judgment of the lower court be annulled, avoided, and reversed; and, proceeding to render such judgment as should have been pronounced by the lower court,

It is ordered, adjudged, and decreed that there be judgment in favor of plaintiff and against the defendant for the sum of six thousand two hundred and fifty dollars, with interest on three thousand seven hundred and fifty dollars at the rate of eight per cent per annum from December the 1st, 1873, until paid, and with like interest on twenty-five hundred dollars from the 15th of December, 1873, until paid, with five per cent attorney's fees and costs of both courts. The whole secured by mortgage of the property described in plaintiff's petition and in the act before E. Bouny, notary, on the 26th of February, 1873.

Rehearing refused.

No. 7698.

MRS. JULIA TRAGER, TUTRIX, VS. THE LOUISIANA EQUITABLE LIFE INSURANCE COMPANY.

A life insurance policy taken out by a father in favor of his children is not *ipso facto* extinguished by the failure of the assured to pay the first maturing premium note, taken by the assurers in place of the cash payment required by the policy merely because of a verbal agreement on the part of the assured, not referred to either in the note or the policy, made without the assent of the beneficiaries of the policy, and after the delivery of the policy to him, that he would surrender the policy on failure to pay the said premium note at its maturity.

Verbal evidence is not admissible to contradict, or vary the declarations, stipulations, admissions, or receipts contained in a written policy of insurance, when the contract is not assailed for error, fraud, or violence.

So long as a life policy in favor of third persons remains in the hands of the assured, and the latter's premium notes are retained by the assurers; and the assurers take no legal action to dissolve the contract, the contract continues to be binding.

Where the stipulation of a life policy is that the assurers shall not pay the amount of the policy until ninety days after notice and proof of the assured's death, and it appears that due notice of death was not given the assurers, they will be liable for interest only from judicial demand.

A PPEAL from the Sixth District Court, parish of Orleans. *Saucier, J.*

Labatt & Aroni for plaintiff and appellant.

Breaux, Fenner & Hall for defendants and appellees.

The opinion of the court was delivered by

DEBLANC, J. This suit is brought on two policies of insurance for

each \$5000, issued and delivered by defendant in favor of the minor children of Jefferson Thomas, on the life of their father.

The company admits the issuance of the policies, but denies its liability, on the grounds :

1. That the premium due and payable at the issuance of the policies, and the interest on the loan note have not been paid.

2. That—instead of paying the premium in cash, as is alleged in the policies, the assured gave his promissory note, in which are included the premium and interest—failed to pay it at its maturity, and—by said failure—forfeited his policies, which were declared canceled, and which he agreed to surrender.

The company lastly asks that—in case it be held that said policies are still in force—the amount of the notes delivered by the assured, for the premium and interest, be deducted therefrom.

The principal question presented in this controversy is whether parol evidence was admissible to show :

1. That—in giving credit for the premium, and taking a note therefor, the intentions of the parties were that the clause of the policies which declares them not binding, and that no risk attaches until the premium is received, was to attach at the maturity of the notes given by the assured, if at that time they were not paid.

2. That, after Thomas' failure to pay the premium notes, there was a distinct agreement between him and the company's agent, in and by which he promised to surrender the policies, defendant to return his notes, and that—in pursuance to said agreement—the policies were canceled.

Two important facts are admitted : Thomas died without surrendering the policies—the company is now in possession of his notes. The policies were canceled on defendant's books, but when and under what circumstances ? This was shown by oral testimony, to the introduction of which plaintiff objected, and for the following reasons :

1. That it is an attempt to vary, alter or modify—by parol—the stipulations of a written contract, so as to destroy its vitality, and show that it never existed.

2. That an acknowledgment contained in a written contract, and without which it could not be enforced, is as conclusive against the party making it as any other part of the contract, and cannot be contradicted by parol.

3. That Thomas' pretended promise to surrender the policies was made without the consent of the beneficiaries, and that at no time he had the right to give up their title.

These policies were issued on the 19th of June, 1871, and—in each of them—there are the declarations that, "in consideration of the sum

Trager vs. Louisiana Equitable Life Insurance Company.

of \$168 60 to them in hand paid by Jefferson Thomas, and of the annual payment of a like amount to be paid on or before the 19th of June in every year next succeeding the date of this policy, the company do assure the life of the said Thomas in the amount of five thousand dollars payable to his wife, and—in case of her death before the demise of her husband—to his legal heirs, etc.," and "that this policy shall not be binding on the company until countersigned by its agent at Baton Rouge, and the advance premium paid," &c.

Read alone, as written in the policies, those declarations assert a fact, and that is that the advance premium was paid by Thomas and received by the company, and justify the presumption that if the required payment had not been made, the policies would not have been delivered to the assured, and—according to one of its stipulated conditions, would have become null and void.

On the 19th of June 1871, Thomas subscribed and delivered to the company three notes payable to its order—two in twelve months, and the other in three months from their date, and—in each of them—he acknowledged that they were given for the premium due and payable on the policies, which—with the interest to accrue thereon—were, in the words of the parties' agreement, *pledged and hypothecated for the payment of the notes*.

Thomas died after his wife, on the 1st of June 1872, before the maturity of two of the notes and without having paid that which matured ninety days after the issuance of the policies. During at least that delay, and though the required premium had not been paid in cash, the policies remained in force and constituted a valid agreement, entered into for a lawful purpose, by parties legally capable of contracting, and whose consent had not been produced by either error of fact, error of law, fraud, threats or violence.

The company contends that its obligations under that agreement have ceased to exist, and why? Because the first maturing of Thomas' notes and the interest due on the loan which was capitalized and included in said note, have not been paid, and he—on that account—*promised* to surrender the policies. If so, its obligations were extinguished, not by the *unexecuted* promise to surrender the policies, but by the effect of the dissolving condition.

Under the written agreement evidenced by the policies and the notes, that position is untenable, and for two reasons—1st: the contracts sued upon do not—in this State, belong to that class of contracts which are dissolved of right, when either of the parties do not comply with his engagements, but to another, a different class, the dissolution of which must be demanded by suit or by exception—and 2d: because a contract, the consideration of which is—partly—an advantage—stipu-

lated for a third person, whose assent is not necessary to complete or perfect the contract, cannot be extra-judicially revoked as to the advantage so stipulated, without the consent of said person, whose acceptance of the gratification is timely manifested, in such a case as this one, by presenting the policies at the death of the assured, and claiming to be paid the amount of the insurance. C. C. 2045 (2040)—2046 (2041)—2047 (2042)—1890 (1884)—1902 (1896). Marcadé, vol. 4, p. 489—Mourlom, 2 vol. p. 635—C. N. art. 1184.

In this instance, relying on a pretended forfeiture of the policies, which—it alleges—occurred during the life of Thomas, the company did not, by a direct action against him, judicially ask the revocation of the agreement which it charges that he has violated, nor does it now, and by exception to plaintiff's demand, ask a revocation which it considers as already accomplished, and—as we have said—by the failure of the assured to comply with the conditions of that agreement, and by his subsequent promise to return the policies.

The counsel representing the company insist that the consent to take Thomas' note, and the delivery of that note, do not constitute a payment of the premium, but that these facts only prove that time was granted for its payment. To sustain this defence, the company's agent was examined, and he testified—in substance—that the extension so granted carried with it the conditions of the policies, including that of a lapse of the risk; if the premium was not paid within the extended delay.

The note taken in lieu of the cash contains no such condition, but—on the contrary—contains another, an adverse stipulation, which contradicts and repels the construction insisted upon by defendant, and that stipulation is that the payment of said note was secured by a pledge of the policies and all interest thereon accruing. How explain or imagine the necessity of that pledge, if—unless the notes were paid at maturity—the policies were to be held as having never attached?

There was—it is urged—between the company's agent and the assured, a verbal agreement, not inserted in either the policies or the notes, and it was that, if he failed to pay the premium note at its maturity, the policies would be forfeited. When due, that note was sent to its agent *to be collected*, he so testified, and he gave it and the others to a sub-agent, with instructions to deliver them to Thomas and get back the policies. The sub-agent declared that he had presented the premium note, demanded payment of the same, and thereafter a surrender of the policies; that the assured had told him that he could not pay the note, would call on the company's agent and surrender the policies; but the sub-agent did not mention that he offered to return either the note which he presented, or any other.

Trager vs. Louisiana Equitable Life Insurance Company.

These declarations, counsel argue, were introduced to show the *full intent* of the parties in making the contract of the 19th of June. To show that intent, the best evidence is that which was reduced to writing, which bears the parties' signature; it is the contract itself. Its recitals are free from obscurity, and one of the most important is "that the policy shall not be binding on the company until the advance premium be paid;" and another—as important as the first, is "that said premium was paid; and—inasmuch as the declarations referred to were introduced by defendant to prove, in contradiction of the company's written acknowledgment, that this vital condition has not been complied with, their object—it is manifest—is not merely to establish the ulterior forfeiture of any admitted contract—but to establish that a contract evidenced by five written instruments—two policies and three notes—and which is not assailed on account of error or fraud, is not such as it is represented in those instruments; still more—that it has not for a moment existed, and from its inception to its pretended perfection, never was but a project to insure and to be insured, binding on Thomas alone."

Mr. Greenleaf said: "In so far as a receipt is evidence of a contract between the parties, it stands on the footing of all other contracts in writing, and cannot be contradicted or varied by parol"—and eminent jurists, here and elsewhere, have almost invariably held that "the written instrument is the safer criterion of what was the real intention of the parties, the terms of whose proposals, the conditions of whose acceptance are presumed to be merged in said instrument, and that—in the interest of justice and mankind—oral testimony should not be received to contradict it, as—in the absence of fraud, deceit or mistake, it is the highest and best evidence of the parties' intent and of their contract."

C. C. 2237 (2234)—1945 (1940)—2276 (2256)—11 L. 416—13 L. 9—18 L. 347—5 A. 315—10 A. 737—19 A. 217—1 Greenleaf Evid. 373—11 Mass. 38—5th Md. 109—14 Wend. 116—12 Pic. 40, 562—1 Bigelow 27, 51, 595, 703—25 Conn. 207, 542—9 Howard 403, 19 Howard 318—Bliss. 598—49 Ill. 180—20 Barb. 471—6 Broom 429—17 N. Y. 199—7th Moakes 459.

We entertain no doubt "that where a policy of insurance contains a condition that the insurance shall not be binding until the actual payment of the premium, the insurers—if they elect to do so—may waive that condition, it being one inserted for their benefit, and in which they alone are interested, and that such waiver may be established by evidence of an express agreement to that effect, or by circumstances from which a waiver may be inferred."

As held by the Supreme Court of New York, "the general rule that receipts—being mere admissions—are liable to contradiction and ex-

planation by parol, may be universally true as applicable to mere receipts when they are disconnected with, or unnecessary to give validity to, contracts or agreements of any kind. When they make part of a contract, as in deeds and bills of lading, the same rule is applicable when the paper is used as a receipt or acknowledgment simply, to defeat an adverse claim, and not as upholding the contract. But it is quite another thing when it is sought to contradict a written receipt incorporated into the contract, for the purpose of defeating the contract itself. The writing read as a whole shows a valid contract, and in this case the receipt, in connection with the condition, shows that to this policy the condition (thus waived) has no application. There being no pretense of fraud on the part of the assured, it would be a fraud upon them to allow the witness now to contradict this acknowledgment for the purpose of bringing the contract within the provision referred to, and thus defeat the policy. The defendants should be estopped by their receipt from alleging that the policy was void because the acknowledgment was untrue." 25 Barbour, p.p. 190, 191, 192, 193.

This doctrine has not been invariably adhered to in the other States of the Union, but wherever adhered to, the reasons given for its application—if contestable—have not been successfully contested, and—in Louisiana—that doctrine, which we consider to be as just as it is wise, is embodied in the article of our Code which abolished the exception of *non numeratâ pecuniâ*.

C. C. 2237 (2234).

In England, it was held by the House of Lords "that a policy purporting to be signed, sealed and delivered, by two of the directors of an insurance company, in presence of their secretary, and according to the powers vested in the directors by the deed of settlement of the company, must be conclusively taken, as against the company, to have been not only duly signed and sealed, but also duly delivered; that such a policy is complete and binding, as against the party executing it, though—in fact—it remains in his possession, unless there is some particular act required to be done by the other party to declare its adoption of it, and that it is not necessary that the assured should favorably accept and take away the policy, in order to make the delivery complete."

2d S. R. H. of Lds' cases, 296.

In Massachusetts, policies, though not under seal, have, nevertheless, ever been deemed instruments of a solemn nature, subject to most of the rules of evidence which govern in case of specialties," and there can be no division of opinion as to the fact that—if oral declarations were allowed to vary or change their terms and stipulations, it would often happen that an entirely or partially different contract would be substituted to the written one, and that the parties' rights and their ob-

 Trager vs. Louisiana Equitable Life Insurance Company.

ligations would depend less on the written instruments, than on the memory and understanding of those present at the formation of the contract; and—as remarked by the Chief Justice of the Supreme Court of New Jersey—a rule of law admitting such evidence would be a repeal of the great primary rule that written agreements are not to be varied or contradicted by parol.

Broom, vol. 6, p. 371, 372.

In a case in which—at the trial—the fact of non-payment of the premium was not denied—the same court said: “This policy of insurance, executed by the president and secretary of the company, contains a formal acknowledgment of the payment of the premium in question, and this should prevent the defendants from averring or showing non-payment for the purpose of denying that the contract ever had any legal existence.”

“The usual legal rule is that a receipt is only *prima facie* evidence of payment, and may be explained; but this rule does not apply when the question involved is not only as to the fact of payment, but as to the existence of rights springing out of the contract. With a view of defeating such rights the party giving the receipt cannot contradict it. An acknowledgment of an act done, contained in a written contract, and which act is requisite to put it in force, is as conclusive against the party making it as is any other part of the contract; it cannot be contradicted or varied by parol.”

6th Broom, p.p. 430, 431.

In his Commentaries, Chancellor Kent said: “The receipt in the policy of the premium is conclusive evidence of payment, and binds the insurer, unless there be fraud on the part of the insured.” Here, as no fraud is alleged, and as the evidence received in the lower court excludes even the idea that any deceit was resorted to, practised or intended by the insured, the testimony contradicting the acknowledgment that the premium has been paid should have been rejected.

Kent, 3 vol., Com. p. 260. 20 Barb. 471—19 A. 217.

Our own legislation expressly provides, as to contracts for the payment of money, which *are not reduced to writing*, that they may be proved by any other competent evidence; and—as to those which are reduced to writing, that parol evidence shall not be admitted against or beyond what is contained in the acts, nor on what may have been said before, or at the time of making them, or since.

C. C. 2277 (2287)—2276 (2256)—5 A. 315—12 M. 684—4 A. 441—25 A. 491..

In Knox vs. Liddell et als. this court said: “It has been urged that the acts spoken of in this article—the last referred to by us—are those only which are mentioned in the preceding one, and which relate to the

Trager vs. Louisiana Equitable Life Insurance Company.

transfer of immovable property; and the counsel has attempted further to restrict the article to authentic acts. This is contrary to the settled jurisprudence of the State."

5 M. N. S. 1—8 M. N. S. 200—4 L. 1, 29—6 L. 255—7 L. 333—8 L. 290—9 L. 572—10 L. 205, 209—5 R. 113.

"Les deux mots *CONTRE et OUTRE le contenu* aux actes expriment exactement le principe, qui revient à dire ceci: on ne peut ni contredire en rien les énonciations de l'acte, ni rien ajouter à ces énonciations * * du moment qu'on a fait un écrit, même dans le cas où l'on n'était pas tenu de le faire, la loi ne permet pas aux parties de se rejeter dans les difficultés de la preuve testimoniale, comme si cet écrit n'existait pas. * * La pensée bien évidente de la loi est qu'on ne sera pas admis à prouver les explications verbales qui ont précédé, accompagné ou suivi la rédaction de l'écrit, pour arriver, soit à restreindre, soit à élargir, soit à modifier d'une manière quelconque les mentions de cet écrit, qui doit toujours être accepté tel qu'il est."

Marcadé, vol. 5, p.p. 104 and 105.

Thomas died within one year from the issuance of the policies, and, by the delivery of his three notes, prepared at and sent from the company's office, had settled on conditions written and accepted by the company—for every cent which—as a premium or otherwise—was to be paid by him during that year. The policies were canceled on the company's books; but that cancellation, without an actual return, or even a legal tender of the notes, was premature, unauthorized and null. Whilst the policies remained in the hands of Thomas, the notes in the company's possession, as long as the latter retained the privilege of electing between the dissolution or enforcement of the obligation evidenced by said notes, the contract which—by a proper course and proper proceeding—might have been dissolved, continued to subsist. 27 A. 113.

"It is urged—as remarked by the Supreme Court of New York—that Mr. Hathorn promised the agent to bring the policy to the office, to be canceled, when he was to receive the return premium, and the agent so testified. Were this undisputed, it neither amounted to a valid agreement that the policy should be held and deemed canceled, without a return of the premium, nor a waiver of performance of the condition on which the right to terminate the risk depended."

55 Barbour, 42, 43—47 Ill. 516—51 Ill. 350, 351—4th Bigelow's Cases, 370.

Plaintiff claims interest at the rate of five per cent from the 4th of September 1872, and that is from about ninety days after the death of Thomas; but, as it does not appear that due notice was given of his death to the company, and—as by an express condition of the policies—its obligation to pay the amounts of insurance did not arise but ninety

Trager vs. Louisiana Equitable Life Insurance Company.

days after notice and proof of the death of the assured, no interest can be allowed, except from judicial demand.

It is therefore ordered, adjudged and decreed that the judgment appealed from is annulled, avoided and reversed.

It is further ordered, adjudged and decreed that Mrs. Julia Trager, as tutrix of the minor children of the late Jefferson Thomas and Caroline E. Trager, recover of the Louisiana Equitable Life Insurance Company of New Orleans, the sum of ten thousand dollars, with interest thereon at the rate of five per cent per annum from the nineteenth day of February, eighteen hundred and seventy-four, and the costs in both courts.

It is further ordered, adjudged and decreed that the following credits are allowed to said company—to wit: one for the sum of two hundred and forty-two dollars and ten cents, with legal interest thereon from the nineteenth of September, eighteen hundred and seventy-one, and two for fifty-six dollars each, with legal interest thereon from the nineteenth of June, eighteen hundred and seventy-two.

It appearing that Mrs. Julia Trager is dead and that Ben A. Day has been appointed dative tutor of the minor children of Jefferson Thomas and Caroline E. Trager, this case is re-opened as to this matter alone, and the decree thereon rendered on the 13th of January 1879 corrected so as to read as follows, to wit:

It is therefore ordered, adjudged and decreed that the judgment appealed from is annulled, avoided and reversed.

It is further ordered, adjudged and decreed that Ben. A. Day, as dative tutor of the minor children of Jefferson Thomas and Caroline E. Trager, recover of the Louisiana Equitable Life Insurance Company of New Orleans, the sum of ten thousand dollars, with interest thereon at the rate of five per cent per annum from the nineteenth day of February eighteen hundred and seventy-four, and the costs in both courts.

It is further ordered, adjudged and decreed that the following credits are allowed to said company, to wit: one for the sum of two hundred and forty-two dollars and ten cents, with legal interest thereon from the nineteenth September eighteen hundred and seventy-one, and two for each fifty-six dollars, with legal interest from the (19th) nineteenth of June eighteen hundred and seventy-two.

Rehearing refused.

No. 7352.

CITIZENS' BANK VS. P. S. WILTZ. BUSH & LEVERT, INTERVENORS AND
THIRD OPPONENTS.

The privilege and pledge of the factor, or furnisher of supplies, on the growing sugar cane crop, under the act of 1874, only covers that portion of the crop which was, in the ordinary sense of the words, to become merchantable. It does not cover that reasonable portion of the crop which is necessarily reserved for seed cane, or the corn grown on the place, and necessary to the production of the subsequent crop.

A PPEAL from the Fourth Judicial District Court, parish of St. Charles.
Duffel, J.

Armand Pitot & Son for plaintiff and appellee.

Breaux, Fenner & Hall for intervenors, appellants.

The opinion of the court was delivered by

WHITE, J. The Citizens' Bank, being creditors of the defendant, secured by mortgage, seized, to enforce the payment of their claim, the mortgaged premises, a sugar plantation in the parish of St. Charles. Bush & Levert, who had made advances to Wiltz for the year 1877, and who were secured by a pledge under the act of 1874, intervened and claimed their privilege and pledge on certain sugar and molasses, as well as on the seed cane, corn, and a quantity of coal levied on along with the plantation. They also asserted the rights of various laborers, whom they claimed to have paid with express subrogation. There were several other interventions, which seem to have been abandoned, as they were not noticed by the judge of the lower court in rendering his judgment, and the controversy now before us is limited to the seed cane, corn, and coal. The evidence establishes that the quantity of seed cane is normal, less, in fact, than in the previous years, and that the quantity of corn is about what would be required for the necessities of the plantation. Under this state of facts the intervenors contend that their privilege and pledge of the crop covers the seed cane and corn for the following reasons :

First—Because their privilege under the act of 1874 is in the nature of a pledge importing possession, and, being one on the growing crop, included all the crop, even that portion usually reserved for seed or for the necessary conduct of the plantation.

Second—That the fact of these articles being immovables by destination does not render the privilege inoperative because the privilege on the growing crop is one on an immovable.

Third—That if the seed cane and corn by becoming immovables by destination are not liable to the privilege and pledge, then they could not so become because forming part of the growing crop they were as

such stricken with the privilege and therefore could not be immobilized to the prejudice of the existing privilege and pledge.

1. The privilege on the "growing crop" we think only covered that which in the usual and ordinary sense of the words was to become merchantable crop, and was not intended to reach and did not apply to the immovables by destination which were a part of the realty, nor to that portion of the crop which in the normal course of things was never to become merchantable crop, but was intended to continue the immovables by destination necessary for the continued production of the realty. We think the parties must have contracted with reference to the known and indispensable usage of keeping from each crop the necessary seed to continue production, as also the corn necessary to make that production possible. The terms of the contract accord with this view of the intention of the parties. The obligation to ship the crop is expressed as follows: "The entire crop of sugar and molasses and other marketable products made, produced, and gathered." We do not take the words growing crop as found in the act of 1874 isolatedly, but we read them with reference to and in connection with the laws *in pari materia*, among which is the provision of C. C. 468, making certain designated articles immovables by destination, and that of C. P. 645, forbidding the seizure separately from the plantation of the articles therein enumerated. The act of 1874 was passed not only in the interests of merchants, but also in those of agriculture, and we can not so construe it as to destroy the very object of its being; The record admits that the seed cane and corn had been used from year to year for the purposes of making the crops; they entered into the crop and became as it were a debt due to the realty to be deducted before the *fructus* or crop was ascertained. *Fructus non intelliguntur nisi deductus impensis* was the rule of the Roman law, and long anterior to the Code Napoleon, in 1649, the Parl. of Paris established the doctrine that the value of seed must be deducted before ascertaining the *fructus*, or crop. Journal des Audiences, tom. 1, p. 405.

2. If the crop *quoad* the pledge thereof under the act of 1874 was an immovable, it would be destructive of the very objects of the act, it would render the pledge of the crop impossible, for if the crop was an inseparable part of the realty possession of the latter would be necessary to that of the former; but such is not the case. True, by article 465 C. C. it is provided that "standing crops and the fruits of trees not gathered and trees before they are cut down are likewise immovable and are considered as part of the land to which they are attached;" but the immovability provided for is only one *in abstracto* and without reference to rights on or to the crop acquired by other than the owners of the property to which the crop was attached. The immovability of a growing crop

is in the order of things temporary, for the crop passes from the state of a growing to that of a gathered one, from an immovable to a movable. The existence of a right on the growing crop is a mobilization by anticipation, a gathering as it were in advance, rendering the crop movable *quoad* the right acquired thereon. The provision of our Code is identical with the Napoleon Code, 520, and we may therefore obtain light by an examination of the jurisprudence of France. When article 520, C. N., was reported by its authors to the Council of State it contained a proviso allowing the seizure of growing crops separately from the land, which was stricken out on the ground that the immobilization referred to in the article was an abstract one, having no reference to rights of creditors or to rights acquired on or to the growing crop which could be mobilized by anticipation. Fenet, Discussion, Motif, vol 11, p. 10, 11, 12. This opinion, expressed and acted on by the compilers, has been adopted by the commentators: "Enfin, dans le cas même d'inhérence parfaite et perpétuelle au sol les produits peuvent se trouver meuble dans un certain cas. Ainsi, quand des grains, fruits, ou bois sont vendus séparément du sol, c'est là une vente de meubles, et l'acheteur n'a qu'un droit mobilier. Ces objets, en effet, ne sont vendus que comme produits, comme choses distinctes du sol, et tant que devant être séparés de lui, dans la réalité ils sont immeubles, mais ils sont cependant vendus comme meubles; l'acheteur achète des choses encore immeubles, mais sous la condition et avec le pouvoir de les mobiliser." Marcadé, vol. ii. p. 338. Our own jurisprudence recognizes the possible mobilization of a growing crop. Poché vs. Bodin, 28 A. 762; Sandell vs. Douglass, 27 A. 629. The pledge, then, of the growing crop was an anticipation of the mobilization of that which was to become movable, and not of the immovables by destination attached to the realty for its perpetual use and production.

3. The pledge on the growing crop, which was *pro hac vice* a movable, did not prevent the immobilization of the seed cane and corn, because their fictitious character of immovability had come into existence before the consenting of the pledge of the growing crop. As we have seen, the plantation had from year to year produced seed and crop therefrom; had produced corn in like manner. The character of immovability of seed was not lost by the mere use of the seed to produce crop and hence to reproduce itself; nor was the immovability of the corn necessary for the cultivation of the crop destroyed by the use of the corn for its own reproduction. The reproduction was not an act of new immobilization, but the continuation of one previously made. The rule is thus stated by Laporte in his *Pandects Françaises* in commenting on C. N. 524, similar in most respects to our own: "We must understand by seed * * * * those destined to sow the ground, which results

from the word sowing, used by the law. That which is in excess of the quantity necessary for planting will be ordinary grain not covered by the legal fiction, and will therefore keep its real nature of a movable. Thus this immovable renews itself yearly and lasts until the seed is in the earth. We perceive that the fiction is established in the interest of agriculture, to prevent the farmer or proprietor from being deprived, either by a seizure or in any other way, of the seed required to plant his fields." Vol. v. p. 57, No. 41; Duranton, vol. ii. p. 230, Nos. 57 and 58.

The judge of the lower court concluded that the coal was not an immovable by destination, and as the crop had been manufactured we think he was correct. He rejected the claim of Bush & Levert to the seed cane and corn, in which conclusion we equally agree.

The judgment is affirmed.

No. 6472.

JOSEPHINE HOWELL ET AL. VS. CHARLOTTE CRONAN ET AL.

When a decree dissolving an injunction with damages does not expressly condemn the surety on the injunction, a separate suit may be instituted on the injunction bond by the defendants in injunction, to recover of the surety the amount of the damages.

An action on an injunction bond to recover damages allowed on the dissolution of the injunction is only prescribed by ten years from the date of the bond. The prescription of the judgment which was enjoined can not affect the judgment in the injunction case wherein the bond was given.

A PPEAL from the Fourth District Court, parish of Orleans. *Campbell, J.*

Plaintiffs unrepresented.

Hornor & Benedict for defendants and appellants.

The opinion of the court was delivered by

MANNING, C. J. Oliver Dubois obtained a judgment in 1865 against William Mish. In 1868, Mish's heir brought suit to annul that judgment, and enjoined its execution, giving bond for five thousand dollars, with Denis Cronan as one of the sureties thereto, and judgment of nullity was rendered in the lower court. On appeal to this court, that judgment was reversed, and the injunction was dissolved with ten per centum damages. The amount of the original judgment, principal and interest, was \$22,499.00.

The plaintiffs are Dubois' heirs. The defendants are Cronan's widow in community and his daughter and sole heir. The object of this suit is to recover of the defendants two thousand two hundred and

forty-nine 90-100 dollars, being ten per centum of the enjoined judgment, which the widow and heir of Cronan are liable for, as is alleged, because of his suretyship to the injunction bond.

The decree of this court, rendered in the case above mentioned, is in these words ;

It is therefore ordered and adjudged that the judgment of the district court be avoided and annulled, and that there be judgment in favour of the defendants, rejecting the plaintiffs' demand, and dissolving the injunction with ten per centum on the amount of the judgment as general damages.

There is no judgment here in express words condemning the surety to pay damages, and the defendants insist that since he is not included in the decree, he cannot be held condemned by implication, and is therefore not liable in the present action. The mistake is, in supposing that this suit is based on that decree. The suit is on the injunction bond, and the omission to include him in that decree necessitated the present supplemental suit. Otherwise, if he had been condemned to pay damages by that decree along with the principal, execution could have issued against him upon it. The defendants' counsel inform us (for there is no appearance in this case for the plaintiffs) that it was urged in the lower court on behalf of the plaintiffs, that the decree is to all intents and purposes a judgment against the surety, inasmuch as the law declares that on the trial of an injunction, the surety shall be considered a party plaintiff in the suit, and in case the injunction be dissolved, the court in the same judgment shall condemn the plaintiff and the surety, jointly and severally, to pay the defendant interest and damages. But the court did not comply with this mandate. If it had, this suit would have been unnecessary. That the principal in an injunction bond is sometimes condemned in damages, and the surety not, is apparent from the rule that in the latter case he may be also surety on the appeal bond, *Leeds v. Yeatman*, 12 La. 383, and from the fact that when not expressly condemned in the lower court, its judgment may be amended in this court so as to include him. *Mora v. Avery*, 22 Annual, 417.

Prescription is pleaded. The injunction bond is dated October 20, 1868. The citation in this suit was served December 20, 1875. Ten years had not elapsed. The defendants however seek to apply it in another way. The original judgment was rendered June 17, 1865, and never having been revived, was prescribed on the same day of 1875, six months before citation of the present action. We cannot perceive how the extinction of the original judgment by prescription affects the judgment in the injunction case, wherein the bond was given, and its date we have seen was in 1868.

By the statement of facts, signed by the counsel of all parties, we

Howell et al. vs. Cronan et al.

find that the enjoined judgment had been reduced to \$6,971.68 principal, before the rendition of the decree by this court, and that a further payment of \$1,897.20 was made afterwards, so that the balance due was \$11,488.34, principal and interest. The plaintiffs are entitled to judgment for ten per centum of that sum. Therefore

It is ordered and decreed that the judgment of the lower court is amended by reducing the sum named therein to eleven hundred and forty-eight dollars and eighty-three cents, and that the plaintiffs pay costs of appeal.

No. 7215.

THE STATE VS. PETER DAVIS.

Where an accused under one verdict of condemnation, is twice sentenced by the court to two punishments, to be inflicted at different places, and of different duration, the last sentence is null and void.

A PPEAL from the First District Court, parish of Orleans. *Abell, J.*

H. N. Ogden, Attorney General, for the State.

The opinion of the court was delivered by

MANNING, C. J. The defendant was convicted of an assault upon one William Reiss by wilfully shooting at him. There is neither any assignment of error, nor bill of exception, in the record, nor any brief on either side.

On examination of the record, we find that on July 19, 1878, the prisoner was brought into court to receive sentence, and he was then condemned to seven months imprisonment in the parish prison.

Five days afterwards, on July 24, 1878, the same prisoner was brought into court to receive sentence upon the same verdict, and he was condemned to six months confinement in the Penitentiary.

The counsel for the prisoner in the lower court abandoned him after taking the appeal, and apparently has not discovered that his client was twice sentenced to two punishments, to be inflicted at different places, and of different duration.

The last sentence is null, and the judgment inflicting it is void. The prisoner was already under sentence, for the same offence, by the court which had first condemned him.

The first judgment is not appealable, and therefore the appeal must be dismissed, and it is so ordered.

No. 7163.

LOUISIANA LEVEE COMPANY VS. THE STATE OF LOUISIANA.

The claim which the Louisiana Levee Company has for work done in constructing, maintaining and repairing levees, under the act No. 4 of the Legislature of 1874, and subsequent acts amendatory thereof, is a debt, not against the State of Louisiana, but against and payable out of the fund created by said act No. 4, and known as the "levee construction fund," which fund is composed of taxes assessed for levee purposes.

A party who formally declares in his pleadings that he has a certain claim due by and exigible against a certain fiscal fund, and that alone, and provokes a judicial decree affirming his claim, will not be heard, in a subsequent suit, to ask that the State be adjudged the debtor of his claim.

The act of the Legislature, No. 139, extra session of 1877, authorizing plaintiffs to bring this suit, does not give them any rights or claims against the State not previously possessed by them, and by suing under that act they are concluded by its terms.

A PPEAL from the Third District Court, parish of Orleans. *Monroe, J.*

Thos. Gilmore & Sons for plaintiffs and appellants.

Jas. C. Egan, Assistant Attorney General, for defendant and appellee.

The opinion of the court was delivered by

WHITE, J. The plaintiff by section four of act No. 139 of the extra session of 1877 (acts of 1877, p. 210) was authorized to bring suit against the State of Louisiana for any cause of action it might have against the State growing out of the construction, maintenance, or repairs of any levees, constructed, maintained, or repaired by said company, and in consequence thereof instituted the present action, alleging the following sums to be due by the State:

Balance due up to first of October, 1873.....	\$1,004,745 62
Balance up to January 25, 1877	588,442 27
Due for work done in advance of taxes of 1877, collectible in 1878.....	115,124 00
Total.....	\$1,708,311 89

The State, after excepting that the petition disclosed no cause of action, answered in substance as follows:

First—By a general denial.

Second—That the plaintiffs had no claim whatever against the State, that whatever might be the amount in arrears for the maintenance, construction, and repairs of levees, such sum was not a debt against the State, but simply a claim against the fund resulting from the taxation levied under the Levee Company laws; that even if the claim of the company was one against the State, the company was estopped from so contending because of its pleadings and the judgment in consequence

Louisiana Levee Company vs. State of Louisiana.

thereon in the case of the State ex rel. Louisiana Levee Company vs. Clinton, Auditor.

Third—That if the laws creating the Levee Company and those passed in furtherance of its being created a debt against the State they were null and void and of no effect, because at the time of the passage of these laws the constitution prohibited the contracting of any debt exceeding the sum of \$25,000,000, which limit had then been reached.

The lower court came to the conclusion that the plaintiff had no claim against the State and dismissed the suit.

The matters in contest embrace a wide inquiry, but may be determined, we think, by answering the following questions:

First—What amount, if any, is due the plaintiff? Whether it is a debt against the State, or simply a debt against the fund created by the taxes hitherto levied or to be hereafter collected from those already levied in support of the Levee Company.

Second—If any sum be due, is it a debt due by the State or simply a claim against the taxes as collected under the Levee Company acts?

Third—If only a claim against the taxes as collected, ought the plaintiff's suit, under the terms of the act of 1877 authorizing it, to be dismissed?

First—Before the trial of the cause below, by consent of both parties, auditors were appointed who reported as follows:

Amount chargeable first of October, 1873.....	\$2,168,045 62
Amount paid out of the taxes of 1871 and 1872.....	1,158,096 67
Balance.....	\$1,009,096 67
Amount chargeable from the first of October, 1873, to June 25, 1877.....	1,804,433 54
Amount paid out of the taxes from October 1, 1873, to June 25, 1877.....	1,224,101 05
Balance.....	\$580,332 49
Amount of work done in advance against the taxes of 1877, collectible in 1878.....	\$115,124 00
Total.....	\$1,704,553 16

The report of the auditors was not homologated, but was referred to be disposed of with the merits of the action. The sums, however, are now admitted to be correct, and the question to be determined is, has the plaintiff a claim against the State for the amount, or is the amount simply payable out of the taxes hitherto levied for levee purposes as they are collected?

Second—The solution of this inquiry involves the examination of the various enactments in favor of the Levee Company. By act No. 4 of 1874 the Levee Company was created. The act was entitled "An Act

relative to the Louisiana Levee Company, a corporation organized under the general laws of the State, constituting it a body politic and corporate, with certain powers, privileges, and franchises, and contracting with said corporation for the construction, maintenance, and repairs of certain levees, and providing for the compensation therefor." After ratifying the notarial charter by which the company had taken being, the second section of this act provided as follows :

"SEC. 2. That for the purposes of providing and maintaining proper and efficient levees throughout all portions of the State watered by the Mississippi and the rivers and streams and bayous running into and from the same, and protecting the inhabitants from inundation, the State of Louisiana contracts and agrees with said Louisiana Levee Company in terms as follows :

The first paragraph of this section creates a board of engineers or commissioners with power to fix the dimensions and work to be done.

The second paragraph is as follows :

"That the said Louisiana Levee Company for and in consideration of the compensation, benefits, and rights and powers herein stated shall take charge of, manage, control, construct, repair, and keep in repair all the levees in this State on the Mississippi river, its tributaries and outlets, and such levees in the State of Arkansas as may be necessary to protect any of the lands of the State from overflow by the waters of the Mississippi or the Arkansas rivers."

The third paragraph gave the corporation the management and control of these levees.

The fourth provided that "the said corporation shall within sixty days from the receipt of the report of said commission commence the construction of said levees, and shall thereafter construct not less than three million yards per year until the said levee shall be completed according to the standard required by the report of said commission."

The fifth paragraph made the corporation responsible for damages to persons injured by their neglect or failure to do their required work.

The sixth provided as follows : "That within thirty days after the receipt of the report of said commission the Governor of the State shall cause an estimate to be made of the cost of constructing or building said levees according to the standard required by the said report, said estimate to be made at the rate of sixty cents per cubic yard of said work; to transmit said estimate to the Auditor of the State; and said Auditor shall thereupon apportion the sum total of the estimated cost of said work among the several parishes according to the assessment rolls of the State, and shall annually thereafter for a period of twenty-one years cause to be collected ten per centum of the sum of said estimates; provided, however, that until said estimate is made as provided in this

Louisiana Levee Company vs. State of Louisiana.

article the Auditor of the State shall levy and collect annually in lieu of said ten per cent of said estimate two mills upon the dollar of the assessed value of the taxable property of the State. The said ten per centum of the sum of said estimate, or said taxes in lieu thereof, shall be collected at the same time and in the same manner and by the same officer as the ordinary taxes of the State are collected. Said ten per centum, or said taxes in lieu thereof, when collected shall be paid over to the Treasurer of the State and shall be set apart as a special fund to be known as the 'Levee Construction Fund,' which shall not be used for any other purpose than as compensation to said Louisiana Levee Company, and said fund shall be paid on the order of the president of said company to the treasurer thereof."

Paragraph seven, That the Auditor of the State shall cause to be assessed and collected annually for the period of twenty-one years from and after the passage of this act two-tenths of one per cent upon the assessed value of the taxable property within the State, to be set apart and be known as the Levee Repair Fund, which said fund shall be collected at the same time and in the same manner and by the same officers as the ordinary taxes of the State.

Paragraph eight gave to the company the power to mortgage or assign the taxes to be collected for its benefit.

Paragraph nine provided "That whereas no taxes as provided herein can be levied and collected during the year 1871, the Governor of the State is hereby authorized and required to issue the bonds of the State to the company to the amount of one million dollars."

This act was amended by act No. 27 of the same year, ratifying and confirming the contract between the Louisiana Levee Company and the Governor of the State of Louisiana. This act amended by providing that the commission to be appointed shall be required to limit the amount of levees to be constructed and repaired as required by their report so that they shall not exceed one million five hundred thousand cubic yards, nor the total amount collected for the construction fund ever exceed nine hundred thousand dollars annually. Acts of 1871, pp. 29 and 64. These enactments were modified by act No. 43 of 1873, the main change being the reduction of the compensation to be paid from sixty cents to fifty cents per cubic yard, with the following provision: That the Auditor shall annually levy and cause to be collected in the same manner and by the same officer as the ordinary taxes of the State are collected a sum sufficient to cover the cost of all levees required to be built by the Commission of Engineers in their annual report, with twenty per cent additional.

Said taxes when collected shall be paid over to the Treasurer of the State, and shall be set apart as a special fund to be known as the Levee

Construction Fund, which shall not be used for any other purpose than as compensation to said Louisiana Levee Company, and the said fund shall be paid on the order of the president of said company to the treasurer thereof; provided, however, that any surplus moneys derived from the taxes collected in any year shall be placed to the credit of said fund for the year next succeeding; and provided, further, that all levees constructed by the said company before the first day of October, 1873, shall be paid for by the State at the rate of sixty cents per cubic yard, "as the existing contract and laws provide."

By the Funding Act of 1874, being act No. 3 of 1874, the levee tax was reduced to three mills, and in the same year an act entitled an act providing for the acceptance by the Louisiana Levee Company of a reduction of the rate of certain taxes to be collected as compensation to said company from four mills to three mills, and in consideration of said reduction relieving said company from liability for damages in certain cases. This act stipulated that upon the acceptance by the Levee Company of the reduction of taxation, made in the Funding Act, the clause in the original grant making them liable for damages shall be repealed. Such is the legislation under which the Levee Company took its being and exercised its functions, except the act of 1875, which we shall hereafter notice.

Did these acts give to the company a claim against the State? We think not. They point out what the compensation of the company is to be; make it result from taxation, and in no manner, even by implication, point to a responsibility on the part of the State over and above the amount of taxation to be levied. The very title of the original act indicates that the compensation provided by the act is the compensation to which the company was entitled. The very clause creating the contracts provides, as we have seen, that the said Louisiana Levee Company for and in consideration of the compensation "hereinafter set," etc., etc. These laws forbid the idea that the taxes were to become the property of the State, for they delegate to the Levee Company the right to mortgage them by anticipation. They are made payable after collection, not as ordinary State taxation, upon the warrant of the proper State officer, but directly to the Levee Company.

What are the reasons given for the contrary view of these various statutes? We are told that the original act provided for the issue of bonds, and thereby creates a fair inference that the State was to be liable for the work. We think, on the contrary, the provision authorizing the issuance of the bonds is the very strongest light by which to read the intention of making the taxes the compensation, where bonds were not provided for. In fact, the inevitable conclusion from the language of the statute is that the bonds were intended to cover only the period where there was

Louisiana Levee Company vs. State of Louisiana.

to be no taxation. It is said that the amendatory act of 1874 points to the liability of the State. This claim results from the language of sec. 6, which we have already quoted, and is predicated on the following: "And provided, further, that all levees constructed before the first day of October, 1873, shall be paid by the State at the rate of sixty cents per cubic yard, *as the existing contract and laws provide.*" This provision admitted no liability on the part of the State. The section reduced the compensation from sixty to fifty cents, and the language quoted was simply a reservation of the rights of the company to be paid at the rate of sixty cents for levees constructed during the period when the law allowed sixty cents. The words "shall be paid by the State" were qualified by the words "*as the existing contract and laws provide,*" and clearly pointed to the payment in the manner directed by the original law, without any additional guarantee or source of revenue.

That original law made the taxes the means of payment, and such was the construction given to these laws, or, at all events, to those pertinent to the present controversy, by our predecessors. In *State ex rel. Louisiana Levee Company vs. Charles Clinton*, Auditor, this court through the organ ship of Mr. Justice Morgan said:

"We do not see in what manner the amendment of the constitution of the State which limits the State debt to twenty-five millions is violative of the law creating the Levee Company. The State has created no debt in their favor. It has assumed no responsibility on their account. It is not paid or to be paid out of the funds of the treasury proper. The State incorporated the company, giving it certain rights and privileges, and imposing heavy burdens upon it, at the same time it contracted with the company with regard to a work of great public utility, secured the company by imposing a general taxation upon all property and made it the duty of the tax collectors to collect the same and deposit the sums collected in the treasury. But it provided at the same time that the moneys so collected should be placed to the credit of a certain fund to be drawn upon by the officers of the company. But this does not create a liability on the part of the State. The State does not pay; its bonds are not out, nor any one its creditor; nor can they be its creditor for any sum contracted by the Levee Company." 25 A. 401.

This adjudication was provoked by the Levee Company itself; was rendered at its instance in a suit to which it was a party. The company was therein claiming the amount of the taxes in the treasury, and the payment was resisted on the ground that the Levee Company laws created a debt and hence violated the constitution. The company in response contended that their act created no claim against the State, but simply a claim to the taxes, and their pretensions were sustained.

This view was re-affirmed in *State vs. Maginnis*, 26 A. 559. It is

now urged by the company that this construction was erroneous; but as we have seen it was a decision provoked by themselves, rendered on their own construction of the contract; and, whether or not it suffices to create an estoppel, we are clear that it points to the contemporaneous construction given to the acts not only by the company themselves, but by the court to whom they submitted it for adjudication, and as such it falls directly within the domain of *stare decisis*. This interpretation, which is now strenuously attacked, was not only provoked by the plaintiff but was made the basis of action by the General Assembly, for when in 1874, in the act providing for an acceptance by the company of the reduction of taxation, the taxes were spoken of as compensation, this language is to be considered as having been used with reference to the previous construction which it had received. Could we overlook these overwhelming conclusions, we would gravely hesitate before declaring that the enactments under review created a debt against the State, for we would be then obliged to recognize their nullity. When the act of 1871 was passed the constitution limited the debt to twenty-five millions of dollars, and that limit was then reached. *State ex rel. Solomon & Simpson vs. Graham, Auditor*, 23 A. 404.

If, then, the Levee Company acts created a debt, that debt would be unconstitutional, and we would be compelled to reject the whole amount. Some claim is made in this instance as to the erroneousness of the declarations of the amount of State debt made in the referred-to case; but we will not re-examine it, and if we did we could reach no other conclusion. In the suit to which we have already referred the Levee Company by their counsel expressly admitted that the limit of the debt had been reached, for the purpose of taking their claim out of the grasp of the constitutional limitation, and we can look with little favor upon their attempt now to reverse the concluded jurisprudence to which they have by judicial admission given adherence.

We are told that the Supreme Court of the United States has given a contrary construction to the Levee Company laws, and the case relied on is that of the Board of Liquidation vs. McComb, 2 Otto, 536. If the claim were true it would not command our attention, because at the date of the rendition of the judgment of the Supreme Court of the United States this court had not only declared that the Levee Company acts created no debt, but that if it did they would have been violative of the State constitution, because at the date of their passage the twenty-five-million-dollar limit was already attained. If, then, the construction given to the opinion of the Supreme Court of the United States were correct we should have to conclude that that high tribunal had disregarded the construction given to a State statute by the highest court in the State, and had disregarded the adjudication of the tribunal of last

Louisiana Levee Company vs. State of Louisiana.

resort within this State as to a question whether the State debt had attained the constitutional limit. Such, however, is not the case. The decision in the McComb case was rendered on the following state of facts: The Legislature of 1875 had appointed a commission to ascertain the amount due the Levee Company, and had provided for the issuance to it of evidences of debt therefor, and had made these evidences of debt fundable in consolidated bonds. The funding of these evidences of debt was enjoined by McComb, and the opinion of the Supreme Court of the United States proceeded upon the hypothesis that the State had recognized the debt, and therefore the sum due the Levee Company was a debt of the State. The language used by Mr. Justice Bradley clearly sustains this conclusion. He says:

"The amount payable to the Levee Company for its services is none the less a debt because already provided for by special taxes, and so far as the State is concerned it is no more of a public burden when chargeable upon one fund than it is when chargeable upon another. If the General Assembly for cause assigned sees fit to alter the mode of payment, it is difficult to see who else has the right to complain, unless specially injured by the change. The taxes formerly appropriated to it will be liberated and made available for other State purposes."

We would be compelled to reach the same conclusion if the act of 1875 were before us, and if the constitutional limitation had not been reached. But in the present controversy the act of 1875, which was the cause of the decision in the McComb case, is blotted from the statute book. The act of 1877, under which this suit is brought, and the provisions of which have been accepted by the company, provides "that nothing herein shall be considered as affecting any legal right of said Levee Company for the purpose of said suit, except any rights claimed by them under the provision of act No. 24 of 1875, which shall be considered in said suit as non-existing, null, and void, and no claim in favor of said company shall be considered as flowing from said act or any certificate presented thereunder."

It is said that the act of 1877, under which this suit is brought, constituted a new contract with the company, and provided for its payment part in bonds and the remainder in levee taxes; hence, whatever might be the force of the original acts, they are enlarged by the act of 1877. The terms of the act of 1877 afford the best denial of this pretension. Section five of that act provides that nothing in this act shall be construed to waive any of the defenses of the State to the suit herein authorized to be instituted, it being the true intent of this act to refer to the court for decision and adjudication under existing laws the entire subject matter of the controversy between the State of Louisiana and the Louisiana Levee Company growing out of the alleged contract made

under the provision of act No. 4 of 1871, approved February 20, 1871, and act No. 43 of the acts of 1873, and all acts amendatory thereto: and nothing moreover herein shall be considered as affecting any legal right of said Levee Company for the purpose of said suit, except any rights claimed by them under the provisions of act No. 24 of the acts of 1875, which shall be considered in said suit as non-existing, null, and void, and no claim in favor of said company shall be considered as flowing from said act, or any certificate thereunder.

Language could not make it plainer that the sole intention and agreement of the act of 1877 was to refer the claimed rights of the Levee Company to the courts for adjudication under the laws as they stood. True, the act of 1877 provided "that in the event judgment should be rendered against the State of Louisiana in favor of said company, the same shall be liquidated and paid as follows:" But that act also provided for the contingency of no judgment being rendered against the State, but one simply against the fund, for the act specially declares that all levee taxes heretofore assessed are hereby set apart as a special fund for the payment according to the provisions of this act of such judgment as may be rendered in favor of the company. The terms of the act contemplated the possibility of the non-rendition of the judgment against the State, and provided for that contingency by declaring that the taxes should be specially set apart to pay "*such judgment*" as may be rendered against the fund. The act made the institution of the suit by the Levee Company under its provisions an acceptance of its terms, and by it they are concluded.

The act of 1877, we think, was an act of compromise by which the Levee Company was authorized to institute suit for the liquidation and ascertainment of the amount of their claim, whether against the State or against the fund, with a provision for the issuance of bonds if the claim was decided finally to be one against the State, with a provision for the payment of the amount ascertained to be due out of the fund if only a claim against the fund. This conclusion is a solution of the third inquiry which we proposed in commencing this opinion.

We do not consider that although the Levee Company was found to have no claim against the State such conclusion should have entailed the dismissal of their suit, as we think the purpose of the act of 1877 was the fixing of the amount which they were entitled to claim, whether against the State or against the fund. In this view, we think the judgment of the lower court erroneous. We will therefore amend it in that particular.

It is therefore ordered, adjudged, and decreed that the judgment of the lower court in so far as it dismisses the suit of the Levee Company be and the same is hereby reversed; and, proceeding to render such

Louisiana Levee Company vs. State of Louisiana.

judgment as should have been rendered by the lower court, it is ordered, adjudged, and decreed that the Louisiana Levee Company be recognized as having a claim against the fund created by the levee taxes heretofore assessed under the provisions of the various laws creating and amending the power of the Levee Company and specially provided for in section six of act No. 139 of 1877, approved May 9, 1877, for the following sums :

One million and nine thousand and ninety-six 67-100 dollars	
due up to June 25, 1877.....	\$1,609,096 67
Five hundred and eighty thousand three hundred and thirty-	
two 49-100 dollars.....	580,332 49
Due up to June 25, 1877, for work in 1877 anticipating levee	
tax 1878.....	115,124 00
Total.....	\$1,704,553 16

All the sums paid thereon since June 25, 1877, to be deducted from this amount; said amount not to be considered a debt against the State, but to be paid by the application of the levee taxes heretofore assessed as provided in section seven of act No. 139 of 1877, approved May 9th, 1877. The sum fixed as due for the amount of work done in advance against the taxes of 1877, collectible in 1878, to be paid from the one third of the levee tax of 1878, as provided in section nine of the aforementioned act. The costs of appeal to be borne by the defendant and those of the lower court by the plaintiff.

No. 7379.

ARISTIDE MILTENBERGER VS. WEEMS HEIRS.

A presumptive heir, who is not shown to have accepted the succession of his deceased mother either unconditionally, or as beneficiary heir, and who has subsequently renounced the succession, is not liable for the debts of the deceased, and may in the absence of proof of an intent on his part to defraud creditors make a valid purchase of the property of the succession sold at a tax-sale. To maintain a revocatory action it is necessary to make not only the holders of the title, but also the debtor, parties to the action.

A PPEAL from the Ninth Judicial District Court, parish of Rapides.
Bowman, J.

M. Ryan for plaintiff and appellant.

R. J. Bowman and *R. A. Hunter* for defendants and appellees.

The opinion of the court was delivered by

WHITE, J. Plaintiff sues for recognition of debt and mortgage, and for the annulment of a tax-sale made of the claimed-to-be mortgaged

property on the ground that the same was collusive and fraudulent, having been illegally and fraudulently provoked by the heirs of the deceased mortgage debtor, Mrs. Weems, with the purpose and object of destroying his mortgage. He avers that one of the heirs bought at the tax-sale, and that portions of the property have since been transferred to the other heirs, one of whom was the dative executor of the deceased, all of which was in consequence of a fraudulent collusion between the heirs to obtain a tax-sale of the property and thereby acquire it free from mortgage. The defendants are six in number; viz., Eugene V. Weems—Anne Weems, Widow Pearce—Mary V. Weems, wife of Crawford—Sarah E. Weems, wife of Wells—R. B. Weems, and Charles C. Weems. Three of them, viz., Eugene V., R. B. Weems, and Mrs. Pearce, excepted that they could not be sued as unconditional heirs until called upon to decide whether they accepted or renounced the succession. Their exception having been overruled, reserving their rights, they answered that they were not bound by the debts of their ancestor, never having in any manner taken the quality of heir or committed any act from which legal acceptance could be deduced; that on the contrary they had formally renounced. They averred that the validity of the tax-sale was covered by the presumption of the thing adjudged resulting from a decree homologating the account filed by the executor of their mother's estate; and that if liable as heirs, then they set up in the alternative the non-existence of plaintiff's debt. Sarah E. Wells answered that she had never committed any act of heirship or as an intermeddler or otherwise claimed or exercised any rights as to her mother's estate, and that she made no claim thereto. Mary V. Weems, wife of Crawford, and C. C. Weems answered substantially to the same effect. The matter was tried below on these pleadings, there was judgment in favor of the defendants, and plaintiff appealed. The facts as disclosed by the record are as follows:

Mrs. A. E. C. Weems died in the parish of Rapides, where she was domiciled, some time in the spring of 1874. Her succession was duly opened on May 24th, 1874, and her son, Eugene V. Weems, appointed and qualified as her dative executor. By the inventory it appears that she was the owner of certain real estate in the parish of her domicile. On the 8th day of November, 1875, at a tax-sale made to enforce the payment of the delinquent taxes for 1872, '73, and '74, Mrs. Pearce, one of the defendants, became the purchaser of the real estate described in the inventory, and has since transferred portions of it to the other or some of the other defendants. The executor filed a final account, in which he stated the loss of the property by the tax-sale, and upon its homologation he was discharged, on the 23d of October, 1876, the present suit having been filed December 30, 1876.

1. The first question for logical consideration is, are the defendants liable for the debts of their mother as her unconditional heirs? and, secondly, was and is the tax-sale null in consequence of the heirship of the parties? But these twofold inquiries are involved one in the other, because it is urged that the purchase being illegal, the heir and those of her co-heirs to whom she sold became thereby unconditional heirs. We will therefore consider them as one question. We see no reason to declare the sale null for matters connected with it independently of the alleged existence of heirship. There is no proof that the executor illegally allowed the taxes to accumulate, so as to infer a combination between himself and his co-defendants. The evidence makes it clear that a larger part of the taxes were due at the death of Mrs. Weems; nor is there any proof that the executor had funds on hand belonging to the estate wherewith to pay the taxes and thus prevent the sale. The record likewise fails utterly to show that either the purchaser or any of her co-presumptive heirs were at the time of sale either beneficiary or unconditional heirs. The sole question then is, can a presumptive heir buy at a tax-sale the property of his ancestor? We answer, yes. In so doing we are not unmindful of the doctrine current in the books and which we have applied, teaching that those whose duty it is to discharge the taxes or who hold a fiduciary relation toward creditors or the property can not take advantage of their own wrong or neglect to acquire at a tax-sale to the prejudice of the owner or creditors. But such is not the case before us. The purchaser was not either unconditionally or beneficially liable irrespective of the purchase. She was only a presumptive heir. She had not accepted the succession, or by word or deed made herself unconditionally liable. She was not, as we have said, even a beneficiary heir; but only a presumptive one, having subsequently renounced. The other defendants are in a like position, all having either formally renounced or disclaimed all heirship in their answers. Were there proof in the record of unconditional heirship, or even of beneficiary acceptance on the part of any of the defendants who have since acquired portions of the property, the principle which we have referred to might be applicable; but resulting as it does from the existence of an obligation to pay the taxes or a duty toward the creditor or property, we can not extend it to the case where neither the duty nor obligation exists. Such being the case, we can not entail unconditional heirship from an act which the heir presumptive had a legal right to do; at all events, not without proof of the existence of facts connected with the purchase showing the intention to become heir or to defraud the estate.

2. Were we, however, to conclude otherwise as to the intrinsic nullity of the sale, we could not presently give the plaintiff relief. It is clear, as we have seen, that even if a presumptive heir can not lawfully

Miltenerger vs. Weems Heirs.

buy at a tax-sale the property of his ancestor, yet such an attempted purchase would not *per se* make him an unconditional heir. This being true, there is no defendant before us; the succession is in no way represented. The heirs are not before us; those cited in that capacity have renounced. True, the persons holding the tax-title which is sought to be annulled are defendants; but not only the holders of the title but the debtor are necessary parties to a revocatory action. C. C. 1970; 1 L. 503; 10 R. 387; 8 A. 386.

We think the judgment below correct, except in so far as it finally passed on the demand of the plaintiff. We consider the case a proper one for nonsuit, and will therefore amend the judgment in that regard.

It is therefore ordered that the decree of the lower court be so amended as to reject plaintiff's demand as in case of nonsuit, and as thus amended it be affirmed with costs.

The Chief Justice took no part in the decision of this cause, having been counsel therein.

No. 7371.

CAROLINE PERRY VS. JOHN C. BURTON.

The letter of one who has signed a receipt, written on the same paper with the receipt, and with special reference to it, is admissible in evidence to explain the receipt.

Parol evidence offered by a defendant in explanation of an alteration in a receipt signed by him, which is responsive to the averments of his answer, and relevant to the explanation, is admissible.

APPEAL from the Seventh Judicial District Court, parish of Pointe Coupée. Yoist, J.

Edward Phillips for plaintiff and appellee.

W. W. Leake and *Sam'l Powell* for defendant and appellant.

The opinion of the court was delivered by

MANNING, C. J. The plaintiff sues to recover \$868.71 with interest, alleging that the defendant collected that sum for her as her agent, and retains it. The defendant specially denies the agency, and the collection for her, and avers that he collected the sum charged for one Joseph Rudman, and is entitled to compensate it by an indebtedness of Rudman to him of \$725 25 with interest, and that this suit was instituted in the plaintiff's name to avoid the plea of compensation. He further avers that the plaintiff, who is a coloured woman, is impecunious, without business capacity, while Rudman has large means, is much in debt, and has placed all of his property in the name of the plaintiff, and in

Perry vs. Burton.

her name carries on business under the pretence of being her agent, and that Rudman and the plaintiff live in concubinage.

There was judgment for the plaintiff, and the defendant appealed.

The receipt of the defendant for the notes he was to collect conforms, in the sums stated therein, to those set forth in the petition. Below it is a letter addressed by Rudman to the defendant in these words;—"This receipt should have bin given in the name of Caroline Perry, myself acting as her agent so as to corispond with the other papers. please write it out so and send it to me as my tems returns. I want you to look to my interest in this matter as it was for you I went in to it." The signature of J. Rudman follows. On the back of this paper is Burton's reply, mentioning the alteration, but it is not copied in the record, and we learn of it from the bill of exception.

From this it appears that the receipt, as originally written, contained the name of Rudman alone as the person from whom the notes were received for collection, but complying with the request made in Rudman's letter, it was altered by adding the words, 'agent for C. Perry,' after his name. The receipt is headed, 'notes of J. Rudman on' the several parties whose names follow. It was evidently Rudman's expectation that Burton would write a new receipt, or he would not have written his letter on the same sheet of paper, but Burton, very likely from carelessness, merely appended the words mentioned above, and sent it back with his letter in reply on the reverse side. It is one of the rare instances when carelessness produced a benefit.

The plaintiff offered in evidence the receipt alone in its altered form, and did not offer the letter beneath it, or the reply on the back. The defendant objected to receiving a part of the paper in evidence without the other writings thereon, which explained it, but his objections were overruled, and the receipt alone admitted, and he reserved a bill.

No reasons are stated in the bill for the rejection, and we are left to the inference that it was under the rule excluding parol testimony in explanation of, or for varying a, written instrument. It would be extending the application of that wholesome rule very far, if it should operate the exclusion of writings on the same paper, that had special reference to the subject matter of the instrument which is sought to be explained. It has often been held that such testimony was admissible. *Cole v. Smith*, 29 Annual, 551, and authorities there cited. *Berard v. Boagni*, 30 Annual, 1125.

The defendant then offered documentary and oral proof to shew the alteration, and how it was made—to prove that Rudman was not the plaintiff's agent, and that the notes mentioned in the receipt belonged to Rudman—that the words, agent etc., were adled at Rudman's instance, who was apprehending a process of garnishment, and were in-

 Perry vs. Burton.

tended by Rudman only to shield the notes from it—that the plaintiff is an ignorant and penniless negress, having no property, and Rudman was using her name in this suit, and in the management of his property, to defraud his creditors, and preclude the defendant from availing himself of his claim in compensation.

The whole of this testimony, which is responsive to the averments of the answer, was excluded for irrelevancy. It was certainly not irrelevant. The same reasons apply to the admissibility of this testimony as to that in the first bill, and the same authorities warrant and justify its reception.

It is ordered and decreed that the judgment of the lower court is avoided and reversed, and the cause is remanded to be proceeded with according to law in the lower court, the plaintiff paying costs of appeal.

 No. 7381.

BRITTON & MOORE vs. MISS VIRGINIA BUSH.

The issuance of a *fi. fa.* under a judgment against one of the solidary debtors on a promissory note, will not interrupt prescription of the note as to the other solidary debtor, against whom no judgment has been obtained.

The rendition of a judgment against one of the makers of a solidary note, does not, as to the other maker who has not been sued, substitute the prescription applicable to judgments, for the prescription applicable to promissory notes. The maker who was not sued is liable only on the note, which is, as to him, prescribed in five years from the date of the judgment against his co-maker.

A PPEAL from the Ninth Judicial District Court, parish of Grant.
Kelly, judge *ad hoc*.

R. J. Bowman and *R. A. Hunter* for plaintiffs and appellees.

A. Cazabat and *R. P. Hunter* for defendant and appellant.

The opinion of the court was delivered by

WHITE, J. In July, 1871, plaintiffs obtained judgment against William and Virginia Bush *in solido* for the sum of \$3146, with interest from December 10, 1868. The cause of action made the basis of the demand covered by the judgment was two certain promissory notes for \$1575 45 each, dated the tenth of December, 1868, and payable twelve and fifteen months after date. Virginia Bush thereafter instituted an action to annul the judgment rendered against her on the ground of want of citation. She was finally successful. Opinion Book 48, p. 301. On the twenty-eighth day of December, 1878, the present suit was commenced with the object of obtaining judgment on the notes as above mentioned. The defense is the prescription of five years. The notes

matured respectively December 10, 1869, and March 10, 1870, hence were prescribed December 10, 1874, and March 10, 1875, unless the course of the running prescription has been interrupted or suspended. Is such the case? Plaintiff relies on the proceedings and judgment against William Bush as establishing the necessary interruption or suspension. But we do not think they are adequate for that purpose. The judgment was rendered against William Bush on tenth of July, 1871. Grant that the citation on him, as a co-solidary obligor, interrupted prescription; grant that the prescription thus caused by the interruption to begin anew its legal course was stayed or suspended by the effect of the suit, so as to prevent it from continuing in its career until the rendition of the judgment—29 An. 298: grant that not only the interruption but also the suspension, good as to one solidary obligor, is good as to the other, the notes now sued on would be none the less prescribed as to the present defendant.

The judgment was rendered on the tenth of July, 1871, the present suit was instituted on the twenty-eighth December, 1878, a period intervening of over seven years.

It is contended that in the suit and judgment against William Bush execution issued against him and property was advertised for sale, which constituted an interruption of prescription as to him, hence as to the present defendant. This claim is predicated on C. C. 2097, saying that a suit brought against one solidary obligor interrupts as to others. But a *fi. fa.* does not interrupt prescription as to the defendant in execution, and a *fortiori* does not do so as to the obligor not sued.

We are referred to Wilson vs. McMain, 29 An. 288. That case only decided the very elementary doctrine that a citation interrupts prescription, which remains suspended until judgment, when it again commences its course. It is said that the effect of the rendition of the judgment was to make the prescription on the note similar to that on the judgment. This is erroneous. Hite vs. Vaught, 2 An. 471; Dwight vs. Brashear, 5 An. 551; Richard vs. Butman, 14 An. 144. This current of authority is now strenuously assailed, but we think unsuccessfully. Hite vs. Vaught is charged as being ill-considered and not in accord with elementary principles. We do not think so.

The opinion of Mr. Justice Slidell is none the less perspicuous because of its terseness. The industry of counsel has been expended in collecting opinions from the commentators on the Napoleon Code, claimed as overwhelmingly showing the want of proper authority for Hite vs. Vaught. We can not with any regard for conciseness review all the authorities quoted, but we will endeavor briefly to show the incorrectness of the propositions which are sought to be defended.

We are told that a judgment constitutes a perpetual acknowledg-

ment on the part of the judgment debtor, therefore the acknowledgment of the debtor interrupted as to his co-solidary obligors. The fallacy is exposed by saying that if the premise were true there would be no prescription of judgments. It is urged that the rendition of the judgment against one of the solidary obligors from the nature of things created a common term of prescription for all. Why so? The theory upon which the law proceeds in making an interruption as to one good as to others is the existence of a legal mandate, *ad conservandum obligationem*, but such mandate gives no power "*ad augendam obligationem*." This limitation on the scope of the fictitious legal mandate prevents a judgment rendered contradictorily with one only of the obligors from creating the presumption of *res adjudicata* as to the obligor not sued. C. C. 2098; Rodière de la Solidarité, p. 84; Marcadé, vol. 5, p. 199; Duranton, vol. —, No. 520; Aubry et Rau sur Zacharie, vol. 5, p. 74; Mourlon, vol. 2, p. 541.

We are aware that the contrary opinions are expressed by Toullier and Demolombe, but their views are in conflict with those of the commentators to whom we have made reference, and we think not reconcilable with the fundamental principles of solidarity—in fact destructive of them, for if adopted the limited and qualified mandate would be extended beyond the power of preservation to that of augmentation. We can not therefore adopt or follow them. If then the judgment against one is not *res judicata* as to the others, the obligation of the defendant was not merged in the judgment, and remained subject to the prescription of notes, unless we were to say that the judgment and the note, although distinct, at least *quoad* the present defendant, were yet subject to the same prescription, despite the provision making one prescriptible by five the other by ten years. But apart from the question of *res judicata*, we think the acquisition of a new term of prescription greater than that governing the obligation when contracted, even by the express consent of one of the co-obligors, would be of no avail against the others. The power to preserve does not import the power to increase. "Every thing," says Rodière, in concluding his admirable examination of the scope of the agency between solidary obligors, "we have said can be resumed in two principles, which are that a co-debtor can never make the obligation of his co-obligor more onerous, but he can improve it." * * * p. 95.

And after clearly stating the same general theory, Laurent, in his recent and valuable commentary, applies it as follows: "One of the co-debtors recognizes a debt which is subject to a short prescription. It is a settled principle that the short prescription is thereby substituted by the prescription of thirty years. The acknowledgment, it is evident, produces its effect as to the debtor who has made it, but does it do so

Britton & Moore vs. Bush.

as to the other debtors? The court of Rouen so held. It was an error. The prescription was more than interrupted; it was changed, its nature enlarged, creating thereby an increase of the obligations of the debtor, since instead of being able to prescribe in six months or one year, he will only be able to do so in thirty years. The co-debtors however give to each other only mandates to preserve the debt and not to increase it. This is decisive." Laurent, vol. 17, p. 308, No. 309; Marcadé, vol. 5, p. 199.

These views are decisive of the issue before us. The proposition that if both co-debtors do not remain bound after the rendition of a judgment obtained against one the judgment will be retroactively, at least in part, destroyed, is an *argumentum ab inconvenienti* which can not impair the force of the application of well-defined principles, when greater inconveniences must result from disregarding them. However, the force of the pretension can only be considered when the effect of the acquired prescription is properly presented for decision.

The judgment of the lower court overruled the plea of prescription. It is reversed and the plea maintained, with costs in both courts.

No. 7236.

THE STATE VS. BRINEY WOODS ET AL.

Where the accused is charged with feloniously breaking into a store "with intent to steal" evidence is admissible to show that certain articles were actually stolen from the store at the time it was broken into and entered.

Whether a witness for the defence in a criminal trial who has already testified of the matter may be re-introduced in order to contradict evidence in rebuttal introduced by the State, is a matter left to the discretion of the court.

The allegation that "the information is defective as not being in conformity to the common-law principles established by section 976 of our Revised Statutes," is too vague to support a motion in arrest of judgment.

A motion in arrest of judgment in a conviction for burglary, on the ground that certain language was not used in the charging part of the information, will not be sustained, when it appears that the charge in the information would not have been increased in perspicuity by the employment of the language.

In an information which charges burglary committed during a certain night, it is not necessary to specify the hour of the night.

The prosecution of all except capital offences may be made on information.

APPEAL from the Superior Criminal Court, parish of Orleans. *Whitaker, J.*

H. N. Ogden, Attorney General, for the State.

T. A. Bartlette and *Paris Childress* for defendants.

The opinion of the court was delivered by

MANNING, C. J. The defendants were convicted of burglary, and were sentenced to confinement at hard labour for eight years.

The charge is, that they "did in the night-time, and with the felonious intent to steal, feloniously and burglariously break and enter the store of one Jacob King, contrary," etc.

The first bill of exception is to the admission by the court of evidence to shew that certain articles had been stolen and carried away from the store at the time of the breaking and entering. The defendants' objection to this is, that they were charged with the breaking and entering with *intent* to steal, and evidence of actual stealing was therefore inadmissible.

Intent can rarely, if ever, be proved except by an act. The commission of an offence is the best proof of an intent to commit it, or as it is put by a law-writer, "the act will be *prima facie* pregnant evidence of an intent to commit it." Waterman's Archbold Crim. Pr. & Pl. 339-3.

The second bill was to the refusal of the court to permit the recall of a witness under the following circumstances;

A woman named Kelly, a witness for the defendants, swore that Briney Woods had in his possession previous to the trial a cigarette lighter which she minutely described as a piece of red tape, flat in shape, half an inch wide, and of the thickness of four sheets of ordinary letter paper, and about fifteen inches long. The defence having closed its case, the State in rebuttal produced a cigarette lighter found in Wood's possession at his arrest, and which was then taken from his person. This lighter was round in shape, and a mixture of yellow and black in colour, whereupon the defendants' counsel asked to recall the woman to say whether or not the lighter produced was the one, or one similar to that which she described. The State objected, and the court sustained the objection on the ground that the witness had already testified upon the point in question, and had described with particularity and positiveness the lighter she had seen in the prisoner's possession, and on the further ground that the prisoner should not be allowed to introduce evidence in rebuttal of rebutting testimony offered by the State. On the other hand the defendants' counsel seem to rest their right to introduce their witness again, upon the idea that the State had introduced *new* evidence in rebuttal, and therefore they had a right to rebut it.

What but new evidence was the State to introduce in rebuttal? It would be supererogatory, and a useless consumption of time, to re-introduce the testimony in chief. When the State rebuts the testimony of the defendants, its evidence is necessarily new, but it can only be of such matters as are pertinent for a rebuttal. As a general observation, applicable to criminal trials, we think that artificial rules ought not to be so far enforced as to exclude any fact from the jury which would aid

them in forming a righteous verdict, however remotely relevant the fact may be, or from whatever source derived. But a motion to re-introduce a witness, who has already testified, or had an opportunity to testify of the matter, must be addressed to the sound discretion of the court. This is juster, and more in accordance with modern construction of the laws of evidence, than to lay down a rigorous rule which could not be relaxed under any circumstances. The discretion of the court will generally be successfully invoked when the testimony has been omitted through mistake or inadvertence, and it has so been held elsewhere. *Freligh v. the State*, 8 Mo. 606. *Vicaro v. Commonwealth*, 5 Dana, 504.

The discretion of the judge was well exercised in the refusal complained of. If the witness' description of the 'lighter' was correct, she could not have truthfully said, the one produced in evidence was the same she had seen.

A motion in arrest of judgment was made on several grounds;

1. The information is defective as not being in conformity to the common-law principles, established by section 976 of our Rev. Statutes.

This is too vague. That section requires the forms of indictment divested of unnecessary prolixity, the method of trial, etc. in criminal prosecutions, to be according to the common law. In what respect the forms and method used in the present case differ from the common law is not pointed out.

2. The information is defective in this, that but one person can commit burglary. All others present are accessories before the fact.

No authority is cited to that effect, and we know of none.

3. That the information does not charge that "the accused feloniously and burglariously did break and enter with intent the goods and chattels of the said Jacob King in the said store there being there in the said store feloniously and burglariously to steal."

The charge would not have been increased in perspicuity by the employment of this language, and unnecessary prolixity was avoided by not employing it.

4. There is uncertainty as to time, the hour of the night when the burglary was committed not being set out.

It is not necessary that the hour should be specified in the charge. *State v. Tazewell*, 30 Annual, 884.

Lastly it is urged in the brief, but was not on the trial, that the information is filed without sanction of law, and that the trial should have been by indictment. The contrary has been uniformly held as to crimes, not punished capitally, and this is one of them. *State v. Anderson*, 30 Annual, 557.

But it is insisted that the act establishing the Superior Criminal

Court requires all prosecutions, there instituted, to be commenced by indictment. This is its language;—sec. 6. No indictment shall be found by the grand jury for offences cognisable, or within the jurisdiction of the First District Court for the parish of Orleans; all trials in said court, except in cases of indictment previous to the passage of this act, shall be upon information of the Attorney General or district attorney, or attorney acting for either of them. All indictments shall be for offences within the jurisdiction of the Superior Criminal Court and shall be returned into said court. Sess. Acts 1874, p. 220.

The first section of that Act gives to the Superior Criminal Court jurisdiction of all crimes, the punishment whereof is death, or imprisonment for life, or at hard labour for more than five years, together with numerous other offences, and the 4th. section makes that jurisdiction exclusive. If the construction of the defendants' counsel be correct, there are certain crimes which are permitted to be prosecuted by information, that this act forbids or prevents being thus prosecuted. But the Act in question, though draughted with conspicuous unskillfulness, does not admit of such interpretation. It must be construed along with other acts in *pari materia*. Its meaning is this. All prosecutions before the First District Court must be by information. All trials upon indictments must be before the Superior Criminal Court. This latter court has exclusive jurisdiction of certain crimes, the punishment of some of which is capital, and others, not. And those not capital may be prosecuted under information.

There is no error in the proceedings of the lower court, and its judgment is affirmed.

No. 6829.

NEW ORLEANS GAS LIGHT CO. VS. BOARD OF ASSESSORS.

Where an owner of real estate who complains of the over assessment of his property by the Board of Assessors, has the matter submitted to the two referees provided for in act No. 96 of the Legislature of 1877, he is concluded by the decision agreed on by the two referees, and can not appeal from that decision to the courts.

A PPEAL from the Sixth District Court, parish of Orleans. *Rightor, J.*

Vallée J. Rozier for plaintiffs and appellants.

Sam'l P. Blanc for defendants and appellees.

The opinion of the court was delivered by

MANNING, C. J. The plaintiff's suit is for the reduction of the assess-

New Orleans Gas Light Company vs. Board of Assessors.

ment of the St. Charles Theatre in this city, of which it is the owner. The assessment was forty thousand dollars, and was made in 1877. The claim is for its reduction to one half that sum. During August of that year the assessment rolls were exposed for inspection and amendment, as required by the law enacted a few months before. Sess. Acts 1877, p. 136 sec. 87. The theatre was then owned by DeBar, who through his agent applied for a reduction of the assessment to thirty thousand dollars, which was the sum for which it was insured. The Board of Assessors rejected this application, whereupon the plaintiff, through its President, who held a mortgage upon the property which was about to be foreclosed, in its own behalf and of DeBar, applied to have the matter submitted for revision to two persons as authorized by sec. 88 of the same act. That section is as follows:

"That any person whose request for correction of assessments shall have been refused by the board of assessors, may submit his case to two persons paying taxes on real estate and personal property in the assessment district in which the property assessed is located, one to be selected by the taxpayers, and one by the board of assessors, and in case of a disagreement they shall call on a third taxpayer to act as umpire, whose decision shall be final, unless the taxpayer under oath shall allege that gross injustice has been done to him, in which case an appeal shall lie to the courts," etc.

A. Hero jr. was selected by the party representing the owner of the property and the mortgage creditor, and Jonas Pickles was selected by the Board of assessors, who reported on August 31 that the property should be assessed at forty thousand dollars—in other words that the assessment made by the board should stand. Shortly thereafter, viz on September 19, the plaintiff purchased the property at public auction upon the foreclosure of its mortgage, and on October 15 commenced this proceeding before the Sixth Court. It is a rule upon the defendant to shew cause why this decision of the "two persons," selected by the parties, should not be set aside and annulled, and the assessment be reduced to twenty thousand dollars. The lower judge dismissed the rule on hearing, and the plaintiff appeals.

The language of the act of the General Assembly is explicit. When a request for the correction of the assessment rolls is made for the purpose of reducing the valuation of a piece of property, and such request has been refused by the Board of assessors, the party may submit his case to two persons, who shall be taxpayers, one of whom is to be selected by himself and the other by the board, and in case of their disagreement a third taxpayer shall act as umpire, whose decision shall be final, unless the applicant shall allege under oath that gross injustice has been done him, in which case an appeal shall lie to the courts. But

what if they do not disagree? It is apparent that the Act does not provide for an appeal from the decision of the two referees. When it directs that an appeal shall lie from the decision of the umpire when oath to gross injustice has been made, and whose decision shall be otherwise final, and that he is to be called in only in case of disagreement, it presupposes that in case of agreement of the "two persons" selected by the parties, the decision which they shall make shall be final. It is obvious therefore that the right of appeal does not come from that act of the General Assembly. Can it be derived from any other source?

The plaintiff seems to take for granted that the rules of our Codes touching the reference of litigations in the courts to arbitrators governs this case, and cites art. 3097 of the Civil Code, permitting one who is not satisfied with an award to appeal from it, although he had renounced such appeal by the submission. new no. 3130. The case falls under wholly different rules.

Revenue laws provide with great particularity for the assessment of property from which the revenue is to be derived, and for its collection. The assessment is sometimes confided to an individual, as in the Act of 1877 *quoad* the country parishes, and sometimes to a Board as in this city. A period is prescribed when parties interested may have their assessments revised, and a mode of doing this is set out. All modern statutes for raising revenue contain some provision for the correction of improper and excessive assessments, and constitute a tribunal to hear and finally determine complaints of that character. If the complaint be, not of any violation of law, but merely of an error of judgment on the part of the assessor, as of over-valuation, the statutory tribunal can alone afford relief, and unless the statute gives the right of appeal therefrom, the decision of such tribunal must be final. And this from necessity, and from the nature of the subject matter. Were it otherwise, the operations of government might be impeded and its machinery effectually clogged by appeals from every assessment. The legislature doubtless thought it was securing the tax-ower from oppressive valuations by compelling the exposition of the tax-roll for a certain period, and according him the right to have the refusal of the Board for reduction reviewed by two persons, in whose selection he could take part, and when they agreed, he should be finally concluded. How much more should he be concluded if these persons not only agreed, but their estimate of value was the same as the actual assessment.

In a late case we said that the award of the referees as to the value of what they considered ought to have effect. *N. O. City R. Co. v. Board of Assessors*, 30 Annual, 261, and writers who have made the laws of taxation a special study lay down the rule that the statutory remedy is supposed to be adequate to all the requirements of justice,

New Orleans Gas Light Company vs. Board of Assessors.

and if a party fails to appeal to the statutory tribunal for the application of that remedy, it is his own folly, and if he does appeal to it, and is dissatisfied with its judgment, he is nevertheless concluded by it. *Burroughs Taxation*, 238 ; *Cooley Tax*. 529.

The lower court properly discharged the rule, and its judgment is affirmed.

Rehearing refused.

No. 7363.

THE STATE EX REL. T. A. BARTLETTE VS. THE BOARD OF LIQUIDATION.

A mandamus will not issue to compel the Board of Liquidation to fund certain warrants when it does not appear that any demand to fund them was ever made on the Board. A demand on the Auditor of the State to fund warrants will not put the Board of Liquidation in default.

The clause in the general appropriation bill of 1871, (act No. 72) providing for the re-imbursement of moneys paid into the State treasury through error, etc., is too general in its terms to allow a court to declare that it included a particular sum which had been paid into the treasury through error by a certain person whose name does not appear in the act.

A PPEAL from the Fifth District Court, parish of Orleans. *Rogers, J.*

Bartlette in propria persona.

The opinion of the court was delivered by

MANNING, C. J. The object of this mandamus is to compel the conversion into consols of two warrants for one thousand dollars each, dated April 6, 1871, in favour of F. C. Mahan, which purport to have been issued to re-imburse him for moneys paid, as tax collector, into the State treasury through error. They state specifically that they are drawn under act No. 72 of 1871.

The respondent answered by a general denial, but introduced no evidence, and has made no appearance in this court.

The relator offered in evidence the warrants, and their indorsement by Mahan, and his own testimony, wherein he says that he "presented to the Auditor the warrants sued on, and he refused to fund them." The refusal of the Auditor is of no consequence. He had not the right or power to fund the warrants. If a majority of the Board of Liquidation reject the application of a holder of a warrant or bond, then such holder may apply to the proper court for relief. *Sess. Acts 1874*, p. 39. There is neither allegation nor proof that any application has been made to the defendant to fund these warrants. On the contrary, the relator

impliedly admits that he never applied to it. He says;—"relator is credibly informed that the Board of Liquidation refuses to fund any warrants unless ordered so to do by mandate of court." He is not entitled to a mandamus to compel the Board to do what it never refused to do.

We are also referred to Act No. 72 of 1871 as the authority for drawing the warrants. In fact, the relator is said by the note of evidence to have offered it in proof, but happily it was not copied in the record, and there is no agreement that the printed copy may be used. There was no need to offer it, and we shall therefore consider it. It is the general appropriation bill for that year. The only clause which we can conceive to be applicable to the matter in hand is this;—"for the re-imbursement of moneys paid into the State treasury through error, or which do not belong to the State, fifty thousand dollars, or so much thereof as may be necessary." Sess. Acts 1871, p. 179. This is too general to allow a court to declare that Mahan's warrants were meant to be included in this clause, without some other proof than is in this record, and particularly when we find numerous clauses in the same act of specific appropriations to individuals by name. *Ibid.* pp. 183-4.

The judgment of the lower court, ordering the Board to fund these warrants is erroneous. We might do injustice to the relator if we finally concluded him by our decree, and we shall avoid it by a nonsuit. Therefore

It is ordered and decreed that the judgment of the lower court is avoided and reversed, and that there be now judgment in favour of the defendant against the plaintiff as in case of nonsuit, and for costs of appeal.

No. 7404.

E. J. GAY VS. N. O. PACIFIC RAILWAY COMPANY.

Where the plaintiff avers in his petition for an injunction that the acts of the defendant have already caused him damage in the sum of \$500, and will, unless restrained, cause him a further damage of \$2000, the district court has jurisdiction.

A PPEAL from the Fifth Judicial District Court, parish of Iberville.
McVea, J.

Barrow & Pope for plaintiff and appellant.

Matthews & Talbot and *Kennard, Howe & Prentiss* for defendants and appellees.

The opinion of the court was delivered by

MANNING, C. J. The plaintiff avers that he is the owner of a sugar

plantation in Iberville parish, and that the defendant, without his consent and despite his express prohibition, has entered upon the plantation and is engaged in laying off and constructing thereon a railroad extending across the whole of his land, without having caused an expropriation thereof to be made—that this railroad is being laid in such manner as to endanger the safety of his sugar-house, and is destroying the crops of cane and corn growing on the land—that the excavations of the defendant's agents and employees have already damaged him in the sum of five hundred dollars, and if the defendant shall persist in constructing the road in the manner proposed, he would be further damaged in the sum of two thousand dollars, independent of the value of the land thus occupied. An injunction was prayed and obtained, prohibiting the defendant from entering upon the land, and constructing the road-bed, and from making any embankments or excavations upon his land, and judgment was prayed against the company for five hundred dollars for damages already sustained by its tortious acts.

The defendant pleaded the general issue, and specially averred that the acts and works complained of, and prayed to be enjoined, were done and completed before any injunction was served upon it, and therefore there was nothing to enjoin—that the company had a legal right to enter upon the plaintiff's land for the construction of the works complained of, and had been induced to believe by the acts, speeches, and declarations of the plaintiff that such entry upon his land and construction of the road thereon would meet with his approval, and that he is now estopped from shifting his position, and claiming damages. It is then averred, that so far from damaging him, the construction of the road across his land has enhanced its value, and will enhance it more in the future.

A jury was empanelled to try the issues thus raised, and on reading the petition, the judge below was of opinion that he had not jurisdiction of the case, because the sum involved did not exceed five hundred dollars, and on motion of defendant he accordingly dismissed the suit.

The plaintiff relies upon *Crescent City L. S. & S. Co. v. Larrieux*, 30 Annual, 798, where we said:—

“The substance of its allegation is, first, that defendant has already, by past acts, damaged it in the sum of \$200; and second, that if permitted to continue, it will irreparably injure plaintiff in the enjoyment of its exclusive rights, privileges, and emoluments under its charter. It is made to appear by affidavit, that these rights and privileges thus alleged to have been invaded, and which will continue to be so invaded, are of a value exceeding \$500, etc. We think that under the allegations of the petition, the terms of the charter and the affidavit, the matter in dispute is shown to be within the jurisdiction of this court.”

In that case, there was no averment of the amount of damages that would be sustained by the continuance of the obnoxious acts, but merely that such continuance would work irreparable injury, and it appeared only by affidavit that the prospective damages would exceed five hundred dollars. In the present case, the prospective damages are laid at a designated sum, set out in the petition, and under the authority of *Larrieux's case* the district court had jurisdiction. Therefore

It is ordered that the judgment of the lower court is avoided and reversed, and the cause is remanded to be proceeded with according to law, the defendant paying costs of appeal.

No. 7376.

HEIRS OF HERRIMAN VS. JOHN JANNEY.

The failure to appoint an attorney of absent heirs with whom to conduct contradictorily an application for the administratorship of the succession, will not affect the validity of the appointment of administrator.

The failure of an administrator to obtain an order of court for the sale of succession property contradictorily with an attorney of absent heirs, will not render the sale null and void. The purchaser at such a sale is not affected by such irregularities.

In the absence of a newspaper published at the place where the probate court is sitting, *posting* an application for letters of administration is sufficient.

The acceptance of an insolvent surety on the bond of an administrator will not affect the validity of his appointment, or of his acts as administrator.

The mere omission of the name of the succession in the body of the oath taken by one qualifying as the administrator of the succession, in the course of the mortuary proceedings, will not affect his qualification as administrator.

Where an order of sale of succession property is applied for it is sufficient to cite the administrator. It is not necessary to obtain the order contradictorily with an attorney of absent heirs.

The clerk of the probate court has power to render an order of sale of succession property.

Where the sale of succession property is attacked on the ground of a fraudulent collusion between the administrator and the creditor who provoked the sale, parol evidence is admissible to show that the property sold for what it was worth.

The question as to what was sold at a public sale by the sheriff is determined by the adjudication, not by the sheriff's deed.

A PPEAL from the Thirteenth Judicial District Court, parish of Concordia. *Hough, J.*

Wade R. Young for plaintiffs and appellants.

O. Mayo for defendant and appellee.

The opinion of the court was delivered by

WHITE, J. In March, 1862, Peter Young, through his attorney, James H. Veazie, instituted suit against Mrs. Jeannette Herriman for

Heirs of Herriman vs. Janney.

the sum of \$1093 54. Personal service was made on Mrs. Herriman of this petition; but it seems that issue was never joined thereon during her life-time. In the summer or autumn of 1863 Mrs. Herriman removed to Texas with her family, where she died about January, 1865. On the 14th of March, 1866, John Janney, through his attorneys, Messrs. Sparrow & Montgomery, presented a petition representing the death of Mrs. Herriman, her non-residence, and his belief that her heirs resided in the State; stated that he had been requested by the creditors to apply for letters of administration, for which he asked. Upon this petition the clerk of the district court on the 14th of March, 1866, rendered an order for the publication, for the inventory, and for the appointment of Janney in the event of no opposition. The application was posted, and there being no opposition, and Janney having taken the oath and given bond, he was appointed administrator of the succession of Jeannette Herriman on the 9th of April, 1866. By order of the clerk, on the 28th of July, 1866, an inventory was taken of the effects of the succession of Jeannette Herriman, and the following property was inventoried: "One eighth part of a tract of land known as the Henry tract, lying on the lower or south side of said tract, containing one hundred and twelve 5-100 acres, acquired from Samuel Garland; also one half of fractional section No. 1, containing sixty-nine 17-100 acres, and fractional section No. 11, containing thirty-one 71-100 acres; also fractional section No. 12, containing three hundred and fifteen 31-100 acres; the whole containing a tract of five hundred and twenty-eight 64-100 acres, of which is improved — supposed to be about two hundred and sixty acres, appraised at eighteen dollars per acre, amounting to \$9506 25. On the 26th of May, 1866, Young, by his attorneys, Mayo & Spencer, revived his suit against Mrs. Herriman by petition against Janney, administrator, who pleaded a general denial, and judgment was rendered after due proof against Janney, administrator, for the amount claimed. On the 3d of March, 1867, Young filed a petition representing the obtaining of his judgment, his non-payment, that the only property of the succession was land which was not productive, that its sale was necessary for the payment of the debts of the succession, and asked that Janney be ordered to show cause why the land should not be sold to pay the debts, and for a new inventory and appraisal of the property. Janney, administrator, answered that having no good cause to show why the prayer should not be granted, he consented to the order to sell as prayed for. On the 10th of June, 1867, the clerk rendered an order directing that as the plaintiff was a judgment creditor of the succession the real estate of the deceased be sold by Janney, sheriff, according to law; that an inventory and appraisal be made of the property of the succession. This inventory was taken, consisting of the same property previously

inventoried, which was appraised at nine dollars per acre, or \$4757 76 for the whole. Under this order an authority was issued to the sheriff to sell the property of the succession of Jeannette Herriman, the order containing the description of the property as found in the inventory. The real estate was advertised for sale for cash, the advertisement giving the same description as that contained in the inventory and order to sell. There being no bid, the property was re-advertised for sale at twelve months credit. The advertisement being identical with the former, the property was adjudicated to Peter Young for five hundred dollars. The sheriff made return on the order of sale that he had sold the property described therein to Young. In making his deed, however, to Young the property was described as follows: "The one eighth part of a certain tract of land lying and fronting on Black river in said parish, known as the Henry grant, *being the south eighth thereof*, etc., the words "*being the south eighth thereof*," etc., having been added to the description as contained in the inventory, as mentioned in the order of sale, as published in the advertisement, and as stated in the return of the sheriff. The addition of these words in the deed making it thereupon appear that the sheriff had sold a certain divided eighth, instead of an undivided one, Janney filed a final account by which the succession was shown to be insolvent, which account, although filed on the 12th of October, 1868, remains unhomologated.

Such are the *mortuaria* proceedings of Mrs. Herriman's estate, a clear apprehension of which is necessary to the decision of the present suit which is a demand on the part of the heirs of Mrs. Herriman to recover the property from Young, with the rents and revenues, and for damages against Janney, on the following grounds:

First. That Janney never was the administrator of Jeannette Herriman, because at the time of his appointment the heirs were in possession through a duly authorized agent. This ground having been destroyed by the proof, the contrary position has been assumed by counsel; viz.: That Janney was not administrator, because the heirs were absent and unrepresented, no attorney for absent heirs having been appointed.

Second. That no publication of his application for letters was made.

Third. That no inventory was made.

Fourth. That no oath was taken or bond executed.

Fifth. That Young's judgment is a nullity, not having been contradictorily rendered with an attorney of absent heirs.

Sixth. That the order of sale was obtained without due notice to the heirs.

Seventh. That the clerk had no power to render the order of sale.

Heirs of Herriman vs. Janney.

Eighth. That the mortuary proceedings were concocted between Young and Janney for the purpose of despoiling the heirs, were fraudulent in their inception, in their execution and accomplishment, that the property was sold for a vile price.

Ninth. That the sheriff sold a divided eighth, while the succession was only owner of an undivided one.

In considering these objections we will eliminate primarily the question of fraud in order to examine it in its proper order, thus enabling us to determine the legal aspect of the objections before considering the effect of the fraud, if any, upon the proceedings.

1. There can be no doubt that the heirs of Jeannette Herriman were absentees, that no attorney of absent heirs was appointed to represent them.

But this failure did not affect the validity of the appointment of the administrator, however it might affect his subsequent acts in which it was necessary to make the heirs parties through the attorney of absent heirs. On the face of the proceedings there was no necessity for an attorney of absent heirs. It has been long since held that a necessity for such appointment should be shown before it is made. *Robouam's Heirs vs. Robouam's Ex.*, 12 La. 74; *Succession of Harris*, 29 A. 746. If the heirs were absent, the succession ought, perhaps, to have been administered by a curator, but the mere calling of the person appointed an administrator, when, perhaps, under the true state of facts he should have been called a curator, can have no legal effect upon the validity of his acts. *Ford vs. Newcomer*, 14 A. 706.

The appointment of Janney by the court fixes his right to the office, at least *quoad* parties dealing with him as such; but even were this not the case, the mere non-appointment of the attorney of absent heirs would not render the proceedings absolutely null. Said this court in *Gibson vs. Foster*, 2 A. 509: "If it were true that no attorney had been appointed to represent the absent heirs when the decree and order of sale was made, the decree would not be an absolute nullity by reason of the omission. A curator was the representative of the succession, and had the capacity to provoke a sale of this property. The act of 1817, making it a duty to prove contradictorily with the attorney of absent heirs that the sale was advantageous and necessary, is merely directory. It contains no prohibitory clause, and although its non-observance might in certain cases subject the curator to damages at the suit of the absent heirs, it constitutes one of those informalities anterior to the judgment which can not be inquired into collaterally." 2 A. 966. But whatever conclusion might be arrived at on this subject, the validity of the sale to Young would not be affected thereby. It is no longer an open question that the purchaser at a probate sale need not look beyond the de-

cree ordering the sale for his protection, and that all irregularities anterior to the order are covered by it, at least *quoad* the purchaser. 11 R. 72 ; 16 La. 440 ; 14 A. 622 ; 18 A. 485 ; 21 A. 505.

These authorities are completely decisive of the remaining objections, but from abundance of caution we will review them *seriatim* :

2. The application for letters was duly posted. In the absence of a newspaper the posting was sufficient.

3. There was an inventory.

4. There was a bond given for ten thousand dollars and signed by General Sparrow. It is contended that at the time he signed as security he was insolvent ; but manifestly the sufficiency of the bond was a matter to be determined by the officer whose duty it was to receive and judge of it. If he took an insolvent security, although we express no opinion thereon, his so doing could not have affected the appointment of the administrator or have destroyed the validity of his acts. The oath was taken ; the pretension of its non-existence results from the following fact : the oath as found in the record has in the body of the oath the name of the succession blank, so that it reads : " I, John Janney, do solemnly swear that I will well and faithfully do and perform all the duties and obligations imposed upon me by law as the ——— of the estate ——— to the best of my understanding and ability. So help me God." Sworn to and subscribed before me this 9th day of April, 1866. The mere leaving of the blank in the oath as found in the record would not destroy its effect so as to relieve Janney from any of the responsibility resulting from it. It is part of the mortuary proceedings. It was taken by him in order to qualify as administrator. It appears to have been taken before the clerk, and the presumption *omnia rite* directly covers the oversight which caused the omission in the body of the oath. *Ball's Administrator vs. Ball*, 15 La. 173. True, the blank in the oath is not filled up with the name of the succession. That name, however, is set forth in the caption, and the oath is signed by the affiant and by the clerk of the court, by whom it was administered, and is immediately on the same paper followed by the appointment in due form.

5. That Young's judgment was not rendered contradictorily with the heirs.

The citation on the administrator was sufficient. Even had there been an attorney of absent heirs, no citation would have been required on him. The debt was proven contradictorily with the administrator to the satisfaction of the court. *Gibson vs. Foster*, 2 An. 509. Even if the judgment be only *prima facie* binding as to heirs, the final account is open to attack, and there is no, even semblance of, proof as to the invalidity of Young's claim.

6. The heirs were not necessarily parties to the order of sale ; if

Heirs of Herriman vs. Janney.

present, notice to them would not have been a prerequisite to its validity. 21 An. 505; 24 An. 530; 28 An. 633.

7. The clerk had the power to render the order. Woods vs. Lee, 21 An. 507; 12 An. 612.

8. Was the sale a fraudulent one? Were the proceedings concocted for the purpose of depriving the heirs of their property? We find no evidence whatever to that effect. It is said that Janney knew at the time he applied for the appointment that the heirs were non-residents, although he alleged his belief that they were within the State. Granted, there is no proof that Young so knew. It is contended that the administration was provoked by Young, and therefore there was a privity between Young and Janney. Young had a right to provoke the administration. He was a creditor. It is charged that the attorneys for Young were the attorneys for Janney. The proceeding, in the succession were conducted by Messrs. Sparrow and Montgomery, the attorneys for Janney, while Young seems to have been represented by Messrs. Mayo and Spencer. After the rendition of the judgment in favor of Young, after the sale, after the payment of his claim, the final account seems to have been made in the name of Janney by Messrs. Mayo and Spencer. There is no evidence whatever of any combination or conspiracy. Young contradicts it by his answer and Janney by his testimony.

The property appears to have been sold for its just value, although for less than the appraisement which was made on the twelfth day of June, 1867. But the proof is complete that between the day of the inventory and the date of the sale the property was swept over by a disastrous overflow. One of the witnesses says that he saw the property in the latter part of 1867, and that the water was deep enough to float a steamboat. There is no contravening proof. It is shown that the land in the vicinage was offered for a less price than that brought by the land in controversy. The property was regularly advertised, regularly offered for cash without a bidder, regularly adjudicated to Young at the second offering without there being any proof whatever of any combination by which the obtaining of a just price was prevented.

The bill of exceptions taken to the admissibility of the testimony showing the value of the property, we think, was not well reserved. The charge of fraud clearly made it competent for the parties to show the actual value of the property. The claim that Young was engaged in a conspiracy to defraud the heirs is manifestly destroyed by the proof in the record that the fact of the sale was directly communicated by Young's attorneys to the husband of the major heir, who was absent.

Mrs. Herriman died in Texas; her heirs were Laura M. Herriman,

Heirs of Herriman vs. Janney.

wife of Dr. Edward Merrill, and Laura Sarah Herriman, a minor. At her death, she left property in Texas which was taken charge of by Dr. Merrill, her administrator. The record shows that before the sale Judge Mayo advised Dr. Merrill of the proposed sale, and received in reply a letter disclaiming all interest in the succession on account of its insolvency, the letter being as follows :

" Waco, Texas, June 30, 1867. Your letter came duly to hand; in reply I can only say that I do not see that I can do any thing about the plantation. I am not able to buy it in. The estate is so much involved that I have no idea the place will sell for enough to pay the debts. The only one that it will affect will be Messrs. M. D. Cooper & Co., I suppose. They, I reckon, can afford to give more than any one else." * *

This acknowledged insolvency was made manifest by the account, and is equally shown to have been the case by the proof in this record. It is worthy of note that there is no eviencce impugning the amount or validity of Young's debt, and the whole matter as we determine it resolves itself into the simple question of the right of an heir in an insolvent estate administered by an administrator to annul the entire *mortuaria* because of the non-appointment of an attorney for absent heirs, not only in the absence of all fraud, but in face of the fact that knowledge of the proceedings was conveyed to the husband of the only major heir.

The complaint as to the fact that the sheriff's deed by the addition of the words "the south eighth thereof," made the sale one of a divided instead of an undivided eighth is erroneous. The adjudication and not the deed vest the title. C. C. 2608; C. P. 693. The inventory correctly described the property, as did the order of sale, the advertisement, and the sheriff's return. The answer of the defendant disclaimed all interest, title, or possession to any but the undivided eighth. The judgment of the lower court was clearly rendered with reference to this admission; it did not quiet the defendant in the title to and possession of the property not bought, but of the one undivided eighth which was sold. The opinion we have formed on the merits dispenses us from passing on the exception filed by Janney.

The judgment is affirmed.

Rehearing refused.

Mr. Justice SPENCER being recused takes no part in this decision.

Taylor vs. McElvin et al.

No. 7378.

ELIZABETH M. TAYLOR VS. ACQUILLA McELVIN ET AL.

A married woman who has no family dependent on her individually for support, and whose husband is in good health, attends to his ordinary avocation, and owns more land than the law exempts from seizure, can not claim the benefit of the homestead act of 1835.

A PPEAL from the Sixth Judicial District Court, parish of St. Helena.
Duncan, J.

Wright & Lea for plaintiff and appellee.

O. P. Amacker, J. E. Wilson, and H. M. Carter for defendants and appellants.

The opinion of the court was delivered by

MANNING, C. J. The plaintiff, a married woman, enjoins the sale of one hundred and sixty acres of land, with the buildings thereon, which were under seizure at the instance of McElvin, to satisfy our decree rendered last year. *McElvin v. Taylor*, 30 Annual, 552. The ground of injunction is, that she is entitled to a homestead under the law of 1865. Rev. Stats. secs. 1691 *et seq.*

The husband of the plaintiff is living, is healthy, and personally attends to the management of his business, which is farming. There are three children, one of whom as a witness in the case says;—"My father, the husband of the plaintiff, is living. The general management of the farm is left to my father's judgment. He is a farmer, and makes his living by farming. For a man of his age, his health is very good. He generally superintends the management of the place. He owns some pine woods land in his own name—sixty acres. It adjoins the homestead place on the south side." Further on, he says;—"The plaintiff has three children living with her, two daughters and a son, two of whom are minors. She lives on the land seized by McElvin. The three children, I suppose, are dependent on their parents for a support."

The son is the witness, and his supposition, even if we accord to it the force of a proof, is that himself and his sisters are dependent, not on the plaintiff, for support, but on both parents. The record contains evidence that his father, the husband of the plaintiff, is the owner of one hundred and twenty-one acres of land, besides the sixty acres mentioned above, having successfully resisted the payment of a mortgage to the Mississippi Mills Manufacturing Company, given by him upon that quantity of land.

That a married woman, though separate in property, is not entitled to a homestead under these circumstances, would seem indubitable. *Barron v. Solibellos*, 28 Annual, 355. And it cannot be contended, that this case falls under the operation of the construction of the homestead

Taylor vs. McElvin et al.

act, applied in *Hardin v. Wolf*, 29 Annual, 333. where the husband was a deaf mute, an imbecile, who could give no assistance in providing for the wants and necessities of the family. We do not pass upon that question in this case, but rest this decision on the simple ground that the plaintiff is not in the condition of that debtor, for whose relief the homestead law was made. She has not a family dependent on *her* for support. Her husband is not infirm, but on the contrary attends to the farm, and owns more land than the law deemed necessary to assign to any impoverished debtor. To sustain such a pretension as is set up here by the plaintiff, would be offering a premium to improvidence, not a boon to misfortune.

Our conclusion on this part of the defence dispenses with the necessity of considering the other matters relied on. The verdict and judgment are erroneous. Therefore

It is ordered and decreed that the verdict of the jury is set aside, and the judgment of the lower court is avoided and reversed, the injunction is dissolved, and that the defendants have judgment against the plaintiff, upon her demand, and for their costs in the lower court, and for costs of appeal.

No. 7389.

SARAH GORDON VS. N. K. KNOX.

The district court is without jurisdiction of a suit by an administratrix to compel a creditor of the succession, who has had certain succession property sold under executory process, to pay over the proceeds of the property for distribution between herself and her minor children. The object of such a suit is to settle a succession, which the parish court alone has authority to do.

Partial payments inscribed on a promissory note, and signed by the deceased maker (whose signature is provable by parol testimony) are admissible in evidence to prove interruption of prescription.

As to the vendee, the vendor's lien is not lost for failure to record it within six days of the sale.

If more than ten years have elapsed from the record of a mortgage it may yet be re-inscribed, and from the date of such re-inscription it will have effect as a mortgage.

APPEAL from the Fifth Judicial District Court, parish of East Baton Rouge. *McVea, J.*

R. W. Knickerbocker and *C. D. Favrot* for plaintiff and appellant.
Herron, Bird & Beale for defendant and appellee.

The opinion of the court was delivered by

MANNING, C. J. The defendant on Sept. 13, 1852, sold a house and lot in the town of Baton Rouge to George Gordon for \$650, payable Feb.

Gordon vs. Knox.

1, 1853, with interest from day of sale. The act of sale contained also a mortgage upon the property, and a retention of the vendor's lien, to secure the payment of the purchase price, and was recorded in the Conveyance book on the same day of its execution; but not in the Mortgage book until the 21st of same month. The mortgage was re-inscribed August 29, 1865.

In the meantime viz. on March 11, 1862, Gordon gave a mortgage on the same property to Michael Devince for \$310, bearing eight per centum interest. Gordon died in 1867, and his widow, the present plaintiff, became his administratrix, and qualified as natural tutrix to his children. The movables were sold, and consisting chiefly of an ungathered cotton crop, the proceeds did not suffice to pay more than the charges for gathering it, and the other privileges resting upon it.

Pending these mortuary proceedings, viz on Sept. 19, 1867, Knox obtained an order of seizure and sale of the mortgaged property, after the usual notice had been served on the present plaintiff as administratrix, and bought it at the sale thus provoked for \$1,150.00. The sum of \$717.13 was applied to the satisfaction of the order of seizure and sale, and the residue was retained in his hands to satisfy the previous mortgage. For it is necessary to observe that Gordon's mortgage to Devince was given in March, 1862, and that Knox's mortgage was not re-inscribed until 1865, thirteen years after its date. Devince's mortgage was subsequently cancelled at Knox's instance, and presumably upon the production by him to the Recorder of his payment of the Devince mortgage.

Precisely ten years after the issuing of the order of seizure and sale, viz Sept. 19, 1877, the widow Gordon instituted this suit, the object of which is to compel Knox to pay to her the proceeds of sale of the mortgaged property. The suit is in her double capacity of administratrix of the succession, and tutrix of her children, and she alleges that she is a widow in necessitous circumstances, and as such is entitled, with her children, to one thousand dollars from the succession, which is a privileged claim ranking the mortgages—that Knox's vendor's lien was lost because not recorded within six days, and his mortgage was lost because the note, secured by it, was prescribed. She prays judgment against him for the sum claimed, and that the Court will order one thousand dollars thereof to be paid to her and her children, and Knox's mortgage and vendor's lien be declared null and void.

The suit is in the district court.

The defendant excepted that the petition disclosed no cause of action, which being overruled, he pleaded what is equivalent to the general issue.

The plaintiff complains that Knox was really, by his appropriation and distribution of the proceeds of sale, undertaking to settle the suc-

cession, and loses sight of the fact that, while objecting to his assumption of authority, she is herself asking the district court to settle it, and distribute the fund arising from the sale as in a mortuary proceeding. It is unnecessary to say that the district court cannot legally usurp the functions of the parish court in that particular, and that portion of the demand was outside of its jurisdiction. As to the other part of the demand, of which the district court had jurisdiction, the administratrix should have interposed her plea of prescription when the order of seizure and sale was about to be executed. She was duly notified of the executory process, and had time and opportunity to avail herself of that, or any other valid ground for arresting the process. The court rightly issued it. *Williamson v. Richardson*, 30 Annual, 1163. But the evidence in this record shews that the note was not prescribed. It matured Feb. 1, 1853. Payments were made on it Nov. 29, 1853, Dec. 26, 1854, May 1857, Nov. 16, 1858, and Jan. 13, 1863, the last credit being signed by Gordon, the debtor. The suit was brought and citation served in less than five years from the last date.

The plaintiff insists that these credits are of no avail in interrupting prescription, because parol evidence is inadmissible to prove an acknowledgment or promise to pay a debt by a deceased person, or an actual payment, so as to take the debt out of prescription. The payments were in writing, and the last of them, on the same paper, was signed by the debtor himself, and the proof was not therefore parol. The proof of his signature by parol was of course admissible.

The vendor's lien of Knox was lost, as to third persons only, by the failure to record it in six days, *Suc. Marc*, 29 Annual, 412, and the failure to re-inscribe his mortgage within ten years gave to Devince's mortgage precedence over him, but it had effect from the date of its re-inscription. It was a valid, existing mortgage at the time of Gordon's death, and when executory process issued for its foreclosure, and the vendor's lien was equally well preserved as to the vendee and those claiming from him.

The plaintiff, as administratrix, neglected to interpose by third opposition at the mortgage sale, and claim the distribution of its proceeds according to the pretensions now set up, and even now the main object of the action is to realize the necessitous widow's portion, by a distribution of succession funds through the medium of a judgment of the district court.

The lower court gave judgment for the defendant, and that judgment is affirmed.

Perry vs. Rue.

No. 7416.

CAROLINE PERRY VS. NICHOLAS RUE.

Where it appears that after an open and public trial of a cause judgment was rendered against the plaintiff, and that he made no application for a continuance on account of surprise, and did not ask for a new trial, and abandoned the appeal he had taken, he can not maintain an action to annul the judgment on the ground that it was rendered on false documents, whose existence was known to him before the trial of the first suit, and on the false testimony of a witness whom he made no effort to contradict, or in any way to discredit.

It is too late to object in this court that under the note of evidence of "Proceedings" of the court in another suit, matter was introduced that did not properly constitute a part of those proceedings, when it does not appear that any objection was raised below, when the matter was being introduced in evidence.

A PPEAL from the Seventh Judicial District Court, parish of Pointe Coupée. *Mahoudeau*, judge *ad hoc*.

Edward Phillips for plaintiff and appellant.

Sam. J. Powell and *W. W. Leake* for defendant and appellee.

The opinion of the court was delivered by

MANNING, C. J. This suit is for the nullity of a judgment on the ground that it was rendered on false documents and false testimony, fraudulently introduced in evidence. The defendant excepted peremptorily as follows :

1. That the petition discloses no cause of action.
2. The matters therein complained of have been already adjudged.
3. The judgment now sought to be annulled was appealed by the plaintiff, which appeal was not prosecuted.
4. That this suit is virtually a motion for a new trial.

The exception was sustained, and the suit dismissed, and we think correctly.

The plaintiff had sued the defendant in March 1877 to recover a tract of land, and judgment was rendered for the defendant in the following December, from which the plaintiff prayed and obtained an order of appeal to this court, returnable at the February Term 1878. She abandoned that appeal, and in March of same year instituted this suit.

The 'false documents' are said to be copies of a pretended mortgage, and of three notes mentioned in and secured by it, executed by Rue to the plaintiff in 1874, which were introduced to shew that while the plaintiff claimed in her suit to have bought this land from Rue in 1872, and to have owned it ever since, she nevertheless accepted from him a mortgage upon it in 1874. The 'false testimony' is charged to be that of Tournoir, the notary who drafted those documents. It nowhere appears how either the testimony or the documents were, or could be,

fraudulently introduced in evidence. The trial was open and public. The plaintiff's counsel was present conducting it, and there is no intimation that the evidence was introduced in other than the usual mode. The plaintiff alleges in her action of nullity that she was entirely taken by surprise by the introduction of this evidence in the former suit. There was no motion for a new trial, but an appeal was taken and abandoned as already narrated.

There are four vices of form for which a judgment can be annulled, after reciting which, it is provided that nullity may be pronounced in all cases where it appears that the judgment has been obtained through fraud, or other ill-practices, on the part of him in whose favour it was rendered ;—as if he had obtained it by bribing the judge or the witnesses, or by producing forged documents, etc. Code Prac. arts. 606-7. One of the earliest interpretations of this article extended the relief to a case where the document was not *forged* (which is the term used in the article) but merely false. *Beauchamp v. M'Micken*, 7 Mart. N. S. 605. Later, it was broadly stated that a judgment may be annulled for a cause, not expressly included in those mentioned in the Code of Practice, when the party attacking it shews he will sustain real injury unless relieved, and this relief cannot be had on appeal, and the case presents facts, on which, a court of equity in other of the States would interfere. *Chinn v. Municipality*, 1 Rob. 523. And this must be considered as overruling *Derbigny v. Pierce*, 18 La. 551, as it is approved, and the principle is re-affirmed in *Norris v. Fristoe*, 3 Annual, 646, and *Swain v. Sampson*, 6 Annual, 799. But the party applying for relief must not have been guilty of *laches*, or of negligence. He must exhibit a case where an execution of the judgment would be against good conscience, and it must shew matter, of which the defeated party could not avail himself in the trial of the former suit, or that he was prevented from availing himself of by accident or fraud, or could not have known of before by reasonable diligence.

The existence of the alleged false documents was known to the plaintiff before and at the trial of the first suit. The false testimony of the notary is alleged to be different from his testimony in another case, and the petition now before us states one of the reasons for surprise to be that plaintiff knew what the notary had sworn to before. No effort appears to have been made to contradict him, or confront him with his previous testimony, or to discredit him in any way. The plaintiff appears to have proceeded with that trial, paying but little heed to this testimony, written and oral, and after judgment to have been so well satisfied of its error as to appeal from it. There was no application for a continuance because of surprise, and no motion for a new trial, nor any other effort for her protection. Very clearly she has not brought

Perry vs. Rue.

herself within the terms of the Code of Practice, even when enlarged by the judicial construction we have noticed.

The plaintiff's counsel calls our attention to the term employed in the note of evidence as descriptive of the evidence offered, i. e. the 'proceedings' and minutes of court in the former suit, and he insists that 'proceedings' are the minutes and nothing else, and therefore neither the petition, answer, testimony, nor judgment should have been copied in the record. It evidently was not so understood on the trial. If the plaintiff found the defendant was introducing under the term 'proceedings' what was not properly included under that designation, he should have objected then and there. If we should require of the clerks an adherence to philological accuracy in the employment of terms in their notes of evidence, more than half of the transcripts filed in this court would be found defective.

Judgment affirmed.

No. 7431.

H. M. KNIGHT VS. A. V. RAGAN.

The courts are invested with full power to inquire into and pronounce on the validity of election returns.

The method for contesting an election pointed out by the various sections of the Revised Statutes of 1870, from section 1421 to 1435 has not been repealed.

A contested election suit is not amenable to the exception of prematurity when instituted *before* the Secretary of State has promulgated the result of the election.

Secondary evidence will not be admitted in support of a charge of forgery to prove the contents of the original tally sheets, or returns, of commissioners of election, until the non-existence of those tally sheets has been shown.

A PPEAL from the Ninth Judicial District Court, parish of Grant.
Blackman, J. Trial by jury.

R. J. Bowman for plaintiff and appellant.

Alphonse Cazabat and *Robert P. Hunter* for defendant and appellee.

The opinion of the court was delivered by

WHITE, J. The plaintiff sues to be recognized as the duly elected parish judge of the parish of Grant. He avers that at the general election held on the fifth of November, 1878, himself and Ragan, the defendant, were candidates for that office. That upon a fair count of the votes at the different precincts of said parish as made by the commissioners thereof he received a majority of thirty-five votes and was fairly and duly elected. That notwithstanding this result announced by the commissioners at the different precincts and by them there tallied the same has been changed and fraudulently altered so as to give to his

opponent a majority of the votes cast. That Charles R. Nugent, sheriff and returning officer, with Aurelius Hargis, his deputy, and H. G. Goodman and W. L. Richardson, fraudulently altered, changed, substituted, and manipulated the vote so as to defeat the result regularly ascertained, tallied, and returned by the commissioners at the various precincts.

The defendant after excepting to the prematurity of the plaintiff's demand, and after pleading the want of any authority to inquire into the validity of election returns, reserving his rights, answered by a general denial. The case was tried by a jury. One of the jurors having been excused, the jury thus composed of eleven rendered a verdict by a majority of one in favor of the defendant, whereupon the plaintiff appealed. We will first consider the exceptions:

We are at a loss to understand upon what theory the defendant predicates his pretension as to the want of legal authority for the contest. It is expressly granted in plain language by section one of act No. 24 of regular session of 1877. Acts of 1877, p. 26. Nor do we understand that the method for contesting an election pointed out by the various sections of the Revised Statutes from section 1421 to 1435 has been repealed. While sections 1419 and 1421 have been amended by the act of 1877, to which we have already referred, the right to contest was given by those articles which were legally existing at the time of their re-enactment, and the method of contest remained and was as provided for in the various statutes embraced within the already enumerated articles of the Revised Statutes. We are told that our predecessors have recognized and declared the repeal of all laws on the subject of the right to contest an election, and that although the act of 1877 may have anew conferred such right, the re-creation of the power did not bring into new being the method of its exercise pointed out by the Revised Statutes. The diligence of counsel, which was of course exercised, has failed to discover, or if discovered, to point us to adjudicated cases in support of the position contended for. Our investigation has led us to a different conclusion, and we know of no law or adjudicated case going to the extent claimed.

The exception of prematurity is unfounded. By section one of the act of 1877 the suit for contest must be brought within thirty days after the official promulgation of the result of the election. In the present instance the result of the election was announced by the sheriff on the seventh of November, 1878, and was officially promulgated by the Secretary of State on December 17, 1878. The present suit was filed Nov. 13, 1878. The position of the defendant is that the official promulgation from which the thirty days are to be reckoned is that made by the Secretary of State, and as this suit was filed before that official promulgation it was not consequently brought within *thirty days after* the official

promulgation. While we think the promulgation of the Secretary of State is the one from which the limitation began we do not understand the statute as preventing the commencement of the proceedings before that period. It prescribes a time after which the suit can not be brought, but does not prevent the exercise of the legal right before the beginning of the thirty-days term.

On the merits, the demand, as we have seen, is based on an alleged fraudulent alteration of the commissioners' returns, and although such is the entire cause of action those returns are not in the record, nor has their absence been explained or accounted for. By section 32 of act No. 58 of the extra session of 1877 the duties of the commissioners of election are thus defined: "Two tally sheets shall be kept of the count, the tally sheets shall have the tallies marked in lines from the beginning to the end of the page, and the total amount of the tallies shall be written in figures immediately after the end of the tallies to prevent any alteration thereof." * * * "As soon as the votes have been counted and the ballot-box sealed as above provided, the commissioners shall make duplicate compiled statements of the names of all persons voted for and the offices for which they were voted, the number of ballots contained in the box, the number of ballots rejected, and the reasons therefor." The law makes it the duty of the commissioners of election to deposit one of the tally sheets and statements with the clerk and to deliver the others to the sheriff or returning officer. Acts of 1877, p. 32, Extra Session.

By section 2 of act No. 99 of the regular session of 1878 it is made the duty of the returning officer to transmit the original tally sheets along with his compilation of the vote to the Secretary of State, who therefrom compiles the result and makes public proclamation thereof. In the present case we have said that the tally sheets have not been produced, although the sole cause of plaintiff's complaint was that they had been fraudulently altered by the local returning officers. This singular omission seems to have been caused by the fact that the tally sheets not having been found in the clerk's office, where duplicate originals should have been on file, the plaintiff at once concluded that there were none on file in the Secretary of State's office, and proceeded to offer secondary evidence of what was the vote tallied by the commissioners and by them returned in order to destroy the official return of the election and thereby inferentially make proof of the forgery or alteration of the commissioners' tally sheets. This proceeding was to the last degree irregular. The original tally sheets, which the law makes it the duty of the returning officer to forward to the Secretary of State, are the bases of his action. If altered or forged, their production would be overwhelming proof to that end, and until their non-existence be shown

Knight vs. Ragan.

we are unwilling to form a conclusion from secondary evidence on so grave a matter as the charged forgery by a returning officer or his deputies.

We will therefore remand the case to afford an opportunity of making that proof which it is probable from the circumstances of the case can be supplied, and which we think the ends of justice require should be either supplied or accounted for before the matter at issue is determined.

It is therefore ordered that the judgment of the lower court be reversed, the verdict of the jury upon which it was rendered be set aside, and that the case be remanded to be proceeded with according to law.

* No. 7124.

CITY OF NEW ORLEANS VS. ST. ANNA'S ASYLUM.

The fact that the rents and revenues of property owned by a charitable corporation are devoted to the charitable purposes for which the corporation was organized, will not exempt such property from taxation. It is only when the property itself is actually and directly used for charitable purposes that the law exempts it from taxation.

The act of incorporation of the St. Anna's Asylum exempting certain property from taxation, did not import a contract which inhibited any subsequent Legislature or Constitutional Convention from annulling or repealing the exemption therein provided for.

A special law granting to a corporation a certain privilege or franchise, and which contains no express repealing clause, does not restrict or impair the operation of an existing general law which reserves to the Legislature the power to revoke the franchise.

A PPEAL from the Third District Court, parish of Orleans. *Monroe, J.*

Sam'l P. Blanc, Assistant City Attorney, for plaintiff and appellee.

Merrick, Race & Foster for defendant and appellant.

The opinion of the court was delivered by

WHITE, J. The defendant, a corporation created for charitable purposes by legislative charter in 1853, having acquired in 1874 a piece of real estate situated in this city, consisting of lots of ground with the buildings and improvements thereon, resists the payment of the taxes levied by the city of New Orleans for 1876 on the ground of exemption.

It is conceded on both sides that the property claimed as exempted is a fire-proof cotton-press now rented and used as such, and in no manner directly used by the asylum, although the revenues thereof are applied to the benevolent and charitable purposes of the corporation.

* This case is now before the Supreme Court of the United States on a writ of error.

Under this state of facts we are of opinion that the ownership of the property by the corporation and the application by it of the revenues derived from the rent does not constitute the actual use covered by the exemption from taxation of property actually used for charitable purposes. We apprehend such exemption to apply to property directly used and not indirectly by the application of the rents which may result from it. These conclusions are in accord with the jurisprudence of the State. Nearly twenty years ago this court drew the distinction between property used by a charitable corporation and property from which it derived revenue. *New Orleans vs. Congregation Dispersed of Judah*, 15 A. 390. Subsequently, in *New Orleans vs. Bank of Lafayette*, 27 A. 836, this court held that article 118 of the constitution, giving power to the General Assembly to exempt property actually used for church, school, or charitable purposes, was enumerative and hence limitive; that all grants of exemption made after the adoption of this provision, of property not in terms covered by it, were void, and that all prior grants of exemption inconsistent therewith were repealed thereby unless protected by contract. In the enforcement of these conclusions in *City vs. St. Patrick's Hall Association*, 28 A. 512, it was determined that property occupied by a charitable association for the execution of the purpose of its being might be constitutionally exempted by the General Assembly from taxation; but that an exemption of property belonging to a corporation and not used by it directly, but only used by applying the revenues received from it, was violative of the constitutional provision already referred to, and hence stricken with nullity.

Under this settled jurisprudence there can be no doubt of the liability of the property in controversy, unless removed from the general rule by some exception. Such exception is claimed as resulting from the charter of the defendant corporation, by which it is contended that a contract was created divesting the State of all power to repeal the exemption claimed. The provision of the charter relied on is as follows: "That the said corporation shall have the same exemption from taxation as was enacted in favor of the Orphan Boys' Asylum of New Orleans by the act approved March 12, 1836." The provision of the act of 1836 referred to is as follows: "That from and after the passage of this act, all the property real and personal belonging to the Orphan Boys' Asylum of New Orleans be and the same is hereby exempted from all taxation, either by the State, parish, or city in which it is situated, any law to the contrary notwithstanding." The mere existence of this statute would not alone entitle the property to exemption, for as we have already seen all statutory exemptions incompatible with the existing constitutional provision have, by it, been repealed. The solitary question, therefore, is, was this exemption a contract of such a nature as to invest the corpora-

tion with such a right as to remove it from all subsequent legislative control? We think not, and in reaching this conclusion we waive all controversy as to the power of the General Assembly to divest its successors of so essential an attribute of sovereignty as the power of taxation. We grant to its fullest extent the doctrine of contract as resulting from the creation by the General Assembly of a private corporation. When the act of incorporation relied on was passed the general laws of the State provided as follows: "A corporation legally established may be dissolved: 1. By an act of the Legislature, if they deem it necessary or convenient to the public interest; provided, that when the act of incorporation imports a contract, on the faith of which individuals have advanced money or engaged their property, it can not be repealed without providing for the re-imbursement of the advances made, or making full indemnity to such individuals. * * * C. C. of 1825, art. 438. This article existed in the Code of 1808, and indicates an anticipation by the wise and enlightened men by whom our Code was compiled, not only of the doctrine of contract subsequently enunciated by the Supreme Court of the United States, but also a keen appreciation of the dangers to society resulting from paralyzing the power of subsequent legislatures to legislate for the public convenience or well being.

This general provision being in existence at the time of defendant's grant, it became by necessary legal implication a part of it, and reserving as it did the right to repeal the charter whenever convenient to the public interest, reserved also, as the greater contained the less, the same absolute power of modification. The charter was a special law and contained no repealing clause. Acts of 1853, p. 228. It did not therefore expressly repeal the general law, nor did it do so by implication, for there is no incompatibility between the grant of a franchise or privilege and a reservation of the power to revoke when deemed necessary for the public interest. Even had the act of incorporation contained the usual clause repealing all laws inconsistent therewith, our conclusion would be the same, for the repealing clause would have to be express in its terms to include the repeal of a general law not in terms conflicting with the later law, nor can it be said that the general law was not intended to apply to corporations by which a contract was created, for it in express words embraces charters of that character. The application of a prior general law to legal rights acquired by an act of incorporation would be only applying to such rights the legal provisions applicable to other legal obligations, for the general theory, as to the existence of legal rights, is, that they are to be examined with reference to the general law in being at the time of their acquisition. In *Gillotte vs. New Orleans*, 12 An. 434, Mr. Chief Justice Merrick said: "In these and like cases there is no pretense that the obligation of a con-

tract had been impaired because the law in force at the time enters into and forms part of the contract."

We need not however seek to fortify our conclusions by authority drawn from analogy. That the provisions of the article of the Code to which we have referred entered into the grant of subsequent legislative charters has long since been enunciated from this bench. "I have," said Mr. Justice Rost as the organ of this court in *Palfrey vs. Paulding*, 7 An. 366, "examined the case on the hypothesis that an acceptance of the act of 1839 on the part of the bank was necessary. But I do not wish to be understood as deciding that point. If charters are contracts, they are contracts which the legislature may in certain cases dissolve. The powers it possesses over charters subsequently granted by the first paragraph of article 438 C. C. are not the less real for having been dormant heretofore." * * * *

The jurisprudence of the Supreme Court of the United States and of the States of this Union is full of examples of the enforcement of the principles which this court thus expressed, and to which we give our adhesion. In many of the other States as a consciousness developed of the far-reaching effects of the doctrine enunciated by the Supreme Court of the United States in *Dartmouth vs. Woodward*, general laws were enacted reserving to the law-making power the right to alter or repeal any subsequent charters. Such statutes have been uniformly held to enter into all charters granted thereafter, and thereby to take them out of the operation of the law of contracts as taught in *Dartmouth vs. Woodward*.

That a general power to repeal or modify a charter enters into the charter, and *pro tanto* divests it of the character of a contract, is now the settled opinion of the Supreme Court of the United States. "Such power, also, that is the power to alter, modify, or repeal an act of incorporation," said Mr. Justice Clifford in *Miller vs. the State*, 15 Wall. 488, "is frequently reserved to the State by a general law applicable to all acts of incorporation or to certain classes of the same, as the case may be, in which case it is clear that the power may be exercised whenever it appears that the act of incorporation is one which falls within the reservation, or that the charter was granted subsequent to the passage of the general law, even though it contains no such condition nor any allusion to such a reservation." Said the same learned justice, as the organ of the court in the case of *Holyoke Company, vs. Lyman*, 15 Wall. 511, in speaking of a claimed contractual exemption from taxation resulting from a charter, "such a charter when accepted by the corporators is undoubtedly a contract that the powers, privileges, and franchises granted shall not be restrained, controlled, or destroyed without their consent, unless a power for that purpose is reserved to the legislature

in the act of incorporation or in some prior general law in operation at the time the act of incorporation was passed." See, also, *Tomlinson vs. Branch*, 15 Wall. 469; *Railroad Company vs. Maine*, 96 United States, 510.

These authorities alone would be decisive of the present controversy; but they do not stand alone; they are but the expression of the concluded opinion of the various State courts, where the question has been presented for adjudication. "But all acts of incorporation," says the Supreme Court of Massachusetts in *General Hospital vs. State Mutual Assurance Company*, "passed since the eleventh of March, 1831, which contain no express provision limiting their duration, are by the provisions of the statutes of the commonwealth existing from that period to the present subject to alteration, amendment, or repeal."

"The act incorporating the defendants was passed in the year 1844, long after the enactment of the revised statutes, and was of course accepted by the corporators subject to the provisions of those statutes." 4 Gray 234.

A charter is a contract between the State and the corporators, and the corporation takes the grant subject to the limitations contained in the act of incorporation. If no power of repeal is reserved, none can be exercised; but when a charter itself or a general statute provides that the charter is subject to repeal by the legislature at its pleasure, the legislature has the right to exercise its power summarily and at will, and its action being a legislative and not a judicial act, can not be reviewed by the courts, unless it should exercise its powers in such a manner as to clearly violate the principles of natural justice. *Lathrop vs. Stedman*, 42 Conn. 583; *Snydam vs. Moore*, 8 Barb. 362; *Olive, Lee & Co.'s Bank*, 27 N. Y. 9; *Hyatt vs. Whipple*, 37 Barb. 595; *Commonwealth vs. Fayette R. R. Co.* 55 Pa. 452; *Bangor vs. Smith* 47 Me. 34; *West Wisconsin R. R. Co. vs. Supervisors*, 35 Wis. 257.

By a provision then in the defendant's charter the right to repeal the same, and necessarily the right to modify, for the greater included the less, was by necessary legal implication reserved, and the exercise of this reserved power by the convention of 1868 divested no vested right and impaired the obligation of no contract. True, the general law in existence at the time of the granting of the charter relied on, while reserving the right to repeal whenever deemed convenient for the public interest, provided also that when the act of incorporation imported a contract upon the faith of which individuals had engaged their property or advanced money that the repeal or modification could only be made by providing for a re-imbusement of the money actually advanced.

This restriction upon the reserved power however has no applica-

tion to the case before us, because the property now claimed as exempt was acquired by gratuitous donation by the corporation after the adoption of the constitution of 1868, and consequently after the repeal of so much of their charter as exempted from taxation their property not embraced within the limits of exemption allowed by that constitution. When a case of prior acquired property presents itself it will be time enough to express our opinion thereon.

These views dispose of the matter at issue, and fix beyond peradventure the liability of the property to the taxation claimed. We have not considered the arguments of expediency which have been so strongly pressed upon our attention. Our duty is to enforce the constitution and apply the law as we find it.

The judgment is affirmed.

MARR, J. I do not concur in the opinion and decree in this case; and reserve the right to file hereafter my dissenting opinion, should I think proper to do so.

CONCURRING OPINION.

MARR, J. Since the decree was pronounced in this case, before and after the application for rehearing, I examined the grounds of my dissent much more carefully than I had been able to do previously. The result is my conviction that the decree as rendered is correct. I concurred in the refusal to grant a rehearing; and desire now to express my concurrence in the decree.

No. 7413.

STATE EX REL. SCHOOL BOARD, PARISH OF ST. TAMMANY, vs. JOSEPH COUSIN ET AL.

Where the sureties on a five-thousand-dollar bond are jointly sued for an amount aggregating two thousand dollars, this court will have jurisdiction, although the demand against each surety is less than \$500.

Where the plaintiff who sues the sureties on an official bond alleges the hopeless insolvency of the principal, the sureties will not deprive themselves of the right of discussion, to which they are entitled under the law, by pleading an exception that admits the truth of the averment of insolvency.

A PPEAL from the Sixth Judicial District Court, parish of St. Tammany. *Duncan, J.*

Jas. M. Wright, district attorney, for plaintiff and appellant.

Ellis & Ellis for defendants and appellees.

The opinion of the court was delivered by

WHITE, J. Plaintiff asks to recover of defendants the sum of \$2030 56, with five per cent interest from July 31, 1874, until paid, as

securities on the official bond of George G. Ingram, deceased, late school treasurer of the school board, parish of St. Tammany. The bond sued on is for five thousand dollars, and was signed by the defendants as follows: Joseph Cousin, A. G. Schoultz, Charles W. Bradley, N. Page, T. H. Dutsch, Stephen Misell, W. R. M. Galloway, and W. S. Barker, for the sum of five hundred dollars each, and Harriet Newell for the sum of one thousand dollars, she having signed the bond twice for five hundred dollars. The petition, after reciting the receipt by Ingram as school treasurer and his failure to account, and his having died hopelessly insolvent, asks judgment against Mrs. Newell for one fifth the amount sued for, and against the remainder for one tenth each jointly and severally.

Harriet Newell filed the plea of discussion and a general denial. Subsequently, all the defendants filed the following exceptions:

First. That the court was without jurisdiction *ratione materiæ*.

Second. No cause of action.

Third. Prematurity.

1. As to Harriet Newell, the court unquestionably had jurisdiction, and we think equally so as to the other defendants. True, the prayer was for judgment against each for less than five hundred dollars; but the suit was on the bond, which was for five thousand dollars, and to enforce a liability*for a breach of the conditions thereof to the amount of over two thousand dollars. The case comes directly within the reach of *Lartigue vs. White*, 25 A. 291.

2. The exceptions no cause of action and prematurity, we presume, were intended to cover the same ground, that is, the plea of discussion. Sureties on official bonds are entitled to discussion. R. S. 354. The plaintiff averred that the principal had "departed this life hopelessly insolvent, not possessed of any thing out of which" the sum due could be made by judicial process. The exception admitted the truth of this averment; but we do not think it sufficient to deprive the securities of the benefit of discussion allowed by law. The principal may have died insolvent and not *possessed* of property, and yet ample means be in existence from which to make the judgment before resorting to the sureties. The law provides for and the petition averred the recording of the bond in the proper mortgage book, and when so recorded it operates a mortgage upon the property of the principal therein. For the greater security of these bonds the law has seen proper as it were to write on them a sweeping clause, *de non alienando*, as provided in 354 R. S., which says: "Whenever an execution shall issue it shall be lawful for the officer to whom it may be directed to seize and sell according to law any lands which may have belonged to the principal obligor at the date of the registry of his official bond, without regard to any subse-

State ex rel. School Board, Parish of St. Tammany, vs. Cousin et al.

quent transfer or change of title, and in whatever hands the same shall be found." * * *

Applying this provision, it is obvious that the insolvency of the debtor and his not possessing property was not a sufficient averment to deprive the surety of the right of discussion; even if such right can as to a surety on an official bond be negatived by averments complete enough to import fully the fruitlessness of an attempted discussion—as to which we express no opinion.

Judgment affirmed.

No. 7306.

CITY OF NEW ORLEANS VS. EUGENE WAGGAMAN.

When the sheriff and his sureties are sued for money collected by him under a writ issuing from a certain court, they can not, under the plea of a general denial, raise the defense that the court was without jurisdiction to issue the writ.

Act No. 30 of the extra session of the Legislature of 1870 creating a new charter for the city of New Orleans, authorizes the city to issue writs of provisional seizure for unpaid licenses, and that act is not unconstitutional.

The sheriff is authorized to receive money in satisfaction of a money demand to enforce the payment of which a provisional seizure has issued, and hence his sureties are bound for such money.

The sheriff commits a breach of his bond when, on the demand of its owner, he fails to pay over the money collected by him.

The agreement of parties to leave a fund in the hands of the sheriff, of which he is the legal custodian, does not release him from responsibility for that fund.

The sureties of a sheriff are entitled to have the property of their principal discussed before execution issues against them, but are not entitled to the right of division.

Where the sureties on a bond bind themselves severally for a certain amount, each is liable up to that amount for any debt he may be bound for as surety.

A PPEAL from the Third District Court, parish of Orleans. *Monroe, J.*

Sam. P. Blanc, Assistant City Attorney, for plaintiff and appellee.

Thos. & C. W. Ellis, Breaux, Fenner & Hall, and *J. H. Grover* for defendants and appellants.

The opinion of the court was delivered by

SPENCER, J. Plaintiff sues Waggaman, late Civil Sheriff of Orleans, and the sureties on his bond to recover \$3535 45, alleged to have been received and collected by him, under sixty-one writs of provisional seizure, issued against various parties by the late Superior District Court, at the suit of the city, for unpaid licenses, \$1500 of which sum it was consented he should hold until the termination of four of said suits, then to be paid to the party obtaining a judgment in his favor. It is alleged that said four suits were decided in favor of the city. It is shown that these allegations of plaintiff are substantially true.

Waggaman pleaded a general denial. The sureties excepted that the petition disclosed no cause of action as to them; and reserving their exception answered in substance that they can in no event be held for more than the amounts for which they severally bound themselves on said bond; that no execution can issue as to them until the property of their principal shall have been discussed; and that in the event of judgment against said principal they will point out property of said principal and advance the costs of discussing it. Therefore they plead the benefit of division and discussion. In conclusion they plead a general denial of the liability of Waggaman or themselves.

There was judgment for plaintiff for \$2172 75—against Waggaman for the whole, and solidarily with him against each surety, up to the amount for which each had bound himself, and to amount of judgment against those whose bond exceeded the judgment. The defendants appeal.

In this court for the first time, and in argument only, it is urged that in fifty-four of the sixty-one license suits aforesaid the Superior District Court was without jurisdiction *ratione materiæ*, for the reason that they did not exceed in amount \$100, exclusive of interest; and the act No. 47 of 1873, conferring jurisdiction of all tax suits on said court is attacked as violative of act 83 of the constitution.

If the suit before us were one of those tax suits, and the defendant were urging want of jurisdiction *ratione materiæ*, we would be called upon to decide it; but the case before us is one to compel the sheriff and his sureties to pay over moneys received by virtue or at least under color of writs issued in those suits. The question of jurisdiction in the court issuing them is therefore a mere collateral point, and, if pleadable at all by the sheriff and his sureties (upon which we express no opinion), it could only be done as a *special defense*; and is not admissible under a general denial. If the sheriff were being sued for failure to execute the writs, we think that as cause therefor he might show that the court issuing them had no authority, but then only by a *special plea*.

It is further objected in argument that there is no law authorizing the issue of writs of provisional seizure for unpaid licenses. Section 20 of the city charter (see act No. 30 of extra session of 1870) expressly provides that remedy. It is said this section is unconstitutional, as no mention is made of licenses or license suits in the title of the act. The title of the act is: "An act to extend the limits of the parish of Orleans, and to change the boundaries of the parishes of Orleans and Jefferson, and to consolidate the cities of New Orleans and Jefferson, and to provide for the government of the city of New Orleans and the administration of the affairs thereof, etc." The act creates and grants

the city a new charter. The title, we think, sufficiently designates its purpose, and section 20 is german thereto. See *Southern Bank vs. New Orleans* (not yet reported) and authorities there cited.

On the merits, the principal question is did the writs of provisional seizure authorize the sheriff to receive from the debtors against whose goods, chattels, and effects they were issued sums of money?

This writ issues *on a money demand* and "in order to secure its payment." C. P. 284. It commands the sheriff to seize the property of defendant in order to secure plaintiff's claim.

Where the defendant tenders to the officer executing the writ the full amount in money of that demand, in satisfaction of the same, the sheriff can not refuse to take it, and subject the debtor to the inconvenience, loss, and expenses of a seizure! The sheriff in such case would be a trespasser, if he persisted in seizing under such circumstances.

But it is said that in these cases the writs did not specify the amounts due plaintiff. That omission does not change the nature of the writ. Again, the writ commanded the sheriff to seize the goods and personal effects of the defendant. If the sheriff could lawfully receive or take furniture and other chattels under it, why not money? The money in these cases was delivered to the sheriff under the writ "in order to secure" plaintiff's demand. He had a right—it was his duty—as sheriff to receive it, and he and his sureties are bound therefor.

It is said that plaintiff's petition alleges no breach of the bond. It alleges that Waggaman as sheriff received these sums, and that after repeated demands in writing he fails and neglects to pay. This was a breach of his bond.

We do not see that the fact of the city attorney giving the sheriff in these suits a discretion as to the cases in which he should seize in anywise affects the case. It was very proper, in order to save the city the costs of fruitless seizures. No more did the agreement between the city and the defendants in the four cases to leave the fund in the hands of the sheriff until final decision relieve the sheriff of his official responsibility. He was the proper custodian of the fund until legally withdrawn from him by bond of one or the other party or by decree of court. The parties agreed not to exercise this right of release.

The sureties of a public officer are by statute entitled to have the property of their principal discussed before execution issues against them. R. S. 2417.

The sureties in this case are not bound *in solido*, but are bound *severally*. The bond is for \$50,000; but each surety does not bind himself for the whole, or for the same sum. Some bind themselves for \$2000, some for \$3000, some for \$5000. The aggregate of *their several*

City of New Orleans vs. Waggaman.

obligations is \$50,000. This is not technical solidarity. Sec. 2, R. 538. But the plaintiff is entitled to a judgment against each for the whole debt, up to the amount for which each is obligated in the bond. The judge *a quo* has substantially done this by condemning all those who are bound for as much as \$2000 to pay *in solido* that sum; and by condemning those who are bound for a sum greater than the judgment to pay *in solido* the excess of the judgment over \$2000. It would perhaps have been theoretically more correct to condemn separately each of those whose obligation was less than the judgment to pay to the extent of his obligation, and each of those whose obligation exceeded the judgment to pay the whole judgment, with the stipulation that there should be but one satisfaction. We know no law that gives these sureties the right of division as against the creditor. What their rights are *inter sese* will have to be determined should one of them pay all or more than his share and call on the others for contribution.

The judgment below must be amended by adding thereto as follows: "It is further decreed that no execution shall issue on this judgment against said sureties until the property of the principal, Eugene Waggaman, shall have been discussed;" and it is now ordered and decreed that the same be so amended, and that as thus amended said judgment is affirmed, appellee to pay costs of this appeal.

Rehearing refused.

No. 6932.

STATE VS. SIMON ST. GEME.

One who is being tried on a charge of murder has a right to demand that the court should instruct the jury that if they find that the deceased had previously threatened the accused with his life, or some great bodily harm, and that subsequently they met without design, and from the motions and actions of the deceased the accused was induced to believe, and had reasonable ground to believe that the deceased was about to carry his threats into execution, the accused had the right to defend himself even by killing his assailant if necessary to protect himself, and the jury should acquit, although it should afterwards appear that there was no such design on the part of the assailant.

Although in charging the jury in a criminal case the court need not charge in the very words asked, provided a charge substantially covering every thing requested be given, it is yet error in the court to designate a perfectly legal request to charge as illegal.

APPPEAL from the Superior Criminal Court, parish of Orleans. *Whitaker, J.*

H. N. Ogden, Attorney General, for the State.

Carroll & Marero for defendant and appellant.

The opinion of the court was delivered by

WHITE, J. The defendant having been indicted for murder, con-

victed of manslaughter, and sentenced to imprisonment at hard labor for twenty years, appeals.

During the trial seven bills of exception were reserved to rulings of the lower court. The opinion we have formed of one of them will render it unnecessary to notice the others.

The prisoner's counsel requested the court to charge the jury: "If you find that the deceased had previously threatened the accused with his life, or of doing him some great bodily harm, and that subsequently they met without design, and from the motions, actions, and hostile demonstrations of the deceased, he was induced to believe, and had reasonable ground to believe, that the deceased was about to carry his threats into execution, the accused had a right to defend himself even by killing his assailant if necessary to protect himself, and you should acquit, although it should afterward appear that there was no such design on the part of the assailant." The court refused to give the charge in full as requested, on the ground that such was not the law of self-defense, but instructed the jury that it was their province as reasonable men to decide, in view of the testimony, whether in their opinion the accused had reasonable ground to consider himself in danger of losing his life, or of suffering great bodily harm.

We think there was error in the refusal to give the charge, and in the statement that such was not the law of self-defense. We can see nothing objectionable in the charge as requested, and think, instead of not being the law of self-defense, that it is a fair and carefully worded statement of that law as expressed by this court, as stated by commentators, and applied in other States. *State vs. Chandler*, 5 A. 489; *State vs. Mullen*, 14 A. 577.

It is contended that the requested charge was illegal, inasmuch as it covered threats whether communicated or not, but its language by no fair rule of construction can be considered as so meaning. Its context obviously contemplates only threats known to the accused at the time of the homicide. If you find that the deceased had previously made threats, and at the time of the homicide the accused had reasonable ground to believe at that moment that the deceased was about to carry his threats into execution, is the statement made. It negatives the claim that uncommunicated threats were intended, because it refers only to threats which the accused believed the deceased to be about to execute at that moment, importing of necessity a knowledge on the part of the accused of the threats which he believed at that moment the deceased was about to execute. These inevitable conclusions, the plain result of the context of the charge, are made more manifest if it were required or possible to do so by bearing in mind the rule that uncommunicated threats, under the laws of evidence, as applied in this State,

are inadmissible. We can not therefore presume in the face of the unequivocal language of the asked-for charge that the threats mentioned were such threats as could not have been before the jury.

It is urged that the charge asked was erroneous, as it made the reasonableness of the apprehension a question not for the jury but depending solely on the condition of the mind of the accused at the time of the homicide. We are at a loss to understand upon what this position is based. The charge in this particular was, that "if from the hostile demonstrations the accused was induced to believe *and had reasonable ground to believe.*" If the request had simply covered what the accused was induced to believe or what he thought was reasonable ground, it would be amenable to the objection urged, but qualifying as it did the words was induced to believe by "*and had reasonable ground to believe,*" it manifestly left the question of reasonable ground to be passed on by the jury as a question of fact. It is said that the charge does not clearly convey the fact that the danger must be imminent to justify homicide, but such is not the case; it explicitly expresses the necessity of the danger being present, and likewise makes the commission of a homicide depend for its justification on its having been necessary for self-protection. It is insisted however that even if the charge was in all respects legal, no harm resulted from the refusal of the court to give it, because the charge which was given by the court was substantially what was requested. While we adhere to the rule as stated in *State vs. Carr*, 25 An. 407, that the court need not charge in the very words asked, providing a full and fair charge, substantially covering every thing requested, be given, we likewise also adhere to *State vs. Chandler*, 5 An. 489, where we said it was error on the part of the court to qualify a perfectly legal request to charge as illegal. In fact, the wisdom of the rule is well illustrated by the case now before us. While the charge given by the court was substantially that asked by the prisoner, yet it was not so amplified. The statement of the court that it was not the law of self-defense must have produced its effect on the minds of the jurors, unless they considered that the court denied the legal correctness of a requested charge, and at once gave the incorrect charge as a correct one. They must naturally therefore have considered that the terseness of the charge of the court excluded some matter stated in the more detailed charge asked and refused as not sound in law, thereby seriously impairing the defendant's rights.

The verdict and sentence are set aside and reversed, and the case remanded to be proceeded with according to law.

La. Board of Trustees of American Printing-house for the Blind vs. Dupuy et al.

No. 7114.

LOUISIANA BOARD OF TRUSTEES OF THE AMERICAN PRINTING-HOUSE FOR THE
BLIND VS. V. J. DUPUY ET AL.

The affidavit of an appellee that his interest in the suit is less than \$500 will not defeat the appeal, when it appears by the allegations of the plaintiff's petition, or his subsequent affidavit, that the amount involved is more than \$500.

Where a number of persons constitute a common agent for a common purpose no one of them has a right to compel the agent to render a separate account to himself. There should be but one proceeding to which all persons in interest should be made parties, and their rights determined *in concursu*.

A PPEAL from the Sixth District Court, parish of Orleans. *Rightor, J.*

John A. Campbell and Merrick, Race & Foster for plaintiff and appellant.

Richardson & Magruder and Thos. Hunton for defendants and appellees.

E. Evariste Moïse, curator *ad hoc*, for the American Printing-House for the Blind.

ON MOTION TO DISMISS.

The opinion of the court was delivered by

SPENCER, J. Plaintiff alleges in substance, that it is a legal corporation, organized in conjunction with similar corporations in other States, for the purpose of printing or procuring books for the blind; that it is possessed of a fund, which by careful management has been more than doubled, and amounts now to something over \$32,000; that it was organized in 1859, and that the fund in its custody and control has been derived from donations of many charitably disposed persons who contributed sums ranging from five dollars to one hundred dollars in amount.

That the defendants, Dupuy, Hunton, Magruder, Richardson, and others, pretending that petitioner has failed to carry out the objects and purposes of its incorporation, within the time prescribed by its charter, claim that petitioner is bound to pay back to the original donors the sums, with accumulated interest, received from them; that said Richardson & Magruder claim to represent as agents and attorneys in fact about one hundred of said donors; and to own, by right of reversion as aforesaid, over ten thousand dollars of petitioner's said funds; that said attorneys have entered into contracts with said donors, whereby they are to have one half of the amounts they may recover of petitioner, said attorneys agreeing to pay all costs and expenses of suits, etc.; that a Kentucky corporation, not in existence at the time of petitioner's incorporation, but claiming the rights of a former corporation in said State, with which petitioner was to have acted in conjunction as

La. Board of Trustees of American Printing-house for the Blind vs. Dupuy et al.

aforesaid, has brought suit in the United States Circuit Court for Louisiana against petitioner, and claims that petitioner is bound to pay over the whole of said fund to it; that in said suit the said parties represented by Richardson & Magruder and by Thos. Hunton are made defendants; that said parties so made defendants claim by answer in said cause that they are donors of a large part of the funds in petitioner's hands and entitled to recover it for the reasons stated.

Further represents that said Richardson & Magruder have instituted numerous and sundry suits against petitioner in different courts—some in justices' courts and some in district courts, in behalf of and as representing various persons claiming to be donors as aforesaid; that petitioner believes that said Richardson & Magruder bring these numerous and separate suits in different tribunals under the hope that they may find some judge who will sustain their pretensions, in which event all the suits would be brought before him; that said Magruder & Richardson obtained a half interest in said claims by sending out circulars to the donors to which was a printed form of receipt and agreement to be signed, giving them one half the amount to be recovered as aforesaid; that they claim to have such agreements with about one hundred donors, and a consequent interest of more than \$10,000 in petitioner's funds; that they have disclosed the names of only a few of these donors represented by them; that much the larger portion of the donors of the said fund desire, as petitioner believes, that the same be devoted and applied to the purposes originally intended, and that the fund has now accumulated to an amount sufficient for effectively doing so; petitioner charges collusion between the said Kentucky corporation and the said parties bringing said individual suits, and that there is an agreement between them to share the results of the suits in the circuit and State courts.

Petitioner further represents that if the donors of said funds have the right to withdraw them from petitioner, the same must be done *in concursu*, in a proceeding to which they are all parties, and upon rendition of account by petitioner; that the prosecution of said separate suits by individuals in different courts, without making the others interested in said funds parties, is illegal and oppressive, intended and calculated to waste and consume in useless litigation the fund, and to prevent its application to the charitable purposes contemplated; that petitioner is advised that the circuit court is without power to protect petitioner against said vexatious proceedings in the State tribunals, and that an injunction ought to issue to prevent the despoiling of said fund of \$30,000 in petitioner's possession, and to compel said defendants to litigate in some single form and contradictorily with all parties in interest the question of ownership and distribution of said fund. Wherefore

La. Board of Trustees of American Printing-house for the Blind vs. Dupuy et al.

petitioner prays an injunction against said parties restraining them from prosecuting against petitioner said separate, individual, and vexatious suits, until the termination of the suit in the United States Circuit Court, or some other suit with proper parties, etc. Prays for such damages as may be proven.

The court *a qua* refused the injunction and dismissed plaintiff's suit. From that judgment this appeal is taken.

Appellees move to dismiss the appeal for want of jurisdiction in this court *ratione materie*, and because the appellees "have not separately or conjointly" any interest in this cause to an amount sufficient to give this court jurisdiction.

Messrs. Hunton, Richardson & Magruder supplement this motion by their several affidavits, to the effect that they "have no present interest in any matter or thing set up in the petition of plaintiff;" that upon certain conditions and contingencies they will be entitled to fees, etc., "but have no other or further interest in this litigation." *Per contra*, the plaintiff and appellant makes oath that the matters involved exceed \$500 in amount, etc.

Of course the jurisdiction of this court must be determined by the demands and allegations of plaintiff's petition, which may be supplemented by affidavit as to the amount involved, etc. Of course the affidavit of appellees that they have no interest in the suit, or an interest less than \$500, can not defeat the appeal, if the demands against them give this court jurisdiction. It will be time enough when the case is heard on its merits to decide what is the nature and extent of appellees' interests, and of their responsibility to plaintiffs. If the defendant in a suit can defeat plaintiff's appeal by simply swearing that he (defendant) has no interest in the suit, the right of appeal by a plaintiff would be a very vain and illusory one.

We think the subject matter in controversy in this suit is shown by the petition to be over \$500, and within our jurisdiction. The gist of plaintiff's action is this: That it is the possessor and custodian of a charity fund exceeding \$30,000 in amount; that the defendants by illegal acts and conduct in interfering with and disturbing its possession and control of said fund will destroy it; that it is entitled to protection of said fund from the illegal acts of defendants, etc. These allegations, supplemented by plaintiff's affidavit, certainly give us jurisdiction.

The motion to dismiss is overruled.

ON THE MERITS.

The allegations of plaintiff's petition are set out in substance in our opinion on the motion to dismiss, and need not be here repeated.

La. Board of Trustees of American Printing-house for the Blind vs. Dupuy et al.

The fifth section of plaintiff's charter provides that when the sum of \$25,000 is raised by it and the co-operating organizations in other States, the funds collected by the Louisiana Board shall then be remitted to the Kentucky corporation at Louisville, to carry on said printing-house for the blind; "provided that should said sum of \$25,000 not be raised within seven years from date of this incorporation, or said publishing-house not be established within nine years from said date, then the donations and contributions received, together with the interest thereon accrued, *after deducting expenses of the corporation*, shall be returned to the contributors and donors thereof."

Under this act of incorporation contributions were solicited and some \$16,000 raised by the Louisiana Board in sums ranging from \$5 to \$100. The fund thus raised in 1859, 1860, and 1861, has been kept at interest by the Board, and has now more than doubled itself.

A number of suits have been commenced by different persons in different courts, against the plaintiff, to compel it to return their contributions, on the ground that the time has expired for building said printing-house according to the charter, and it has not been built, and that by the terms of the act the contributors are entitled to a return of their donations with the accrued interest. A Kentucky corporation, claiming to be the organization referred to in the Louisiana charter, has commenced suit against plaintiff in the United States Circuit Court, to compel the delivery of the whole fund to it. Interventions and cross-bills have been filed in said suit by Dupuy and other contributors asserting their rights upon the fund in plaintiff's hands. Plaintiff truthfully alleges that it is literally being torn to pieces by suits—some in magistrates' courts, some in different district courts, and some in the Federal courts. It alleges that such proceedings are oppressive and illegal, and asks that the plaintiffs in said various suits in the State courts and Richardson & Magruder, who claim to be the agents and attorneys of said parties and of about one hundred others, be enjoined and restrained from such proceedings and be required to proceed in this or some other single suit, contradictorily with all parties in interest. It is said in reply by defendants that there is no privity of contract among the various contributors to this fund, and that each has a separate distinct and independent demand against the plaintiff, and therefore a perfect right to sue it separately.

We can not concur in this view of the case. The charter by its very terms, and as the suing donors themselves allege, constituted a contract of mandate between the contributors and the corporation. Those who gave their money did so for the uses and purposes and upon the terms and conditions therein written. The corporation became the common mandatary of the donors, and the rights and obligations of all

La. Board of Trustees of American Printing-house for the Blind vs. Dupuy et al.

the parties are to be ascertained and determined by reference to its provisions. As we have seen, the fifth section expressly provides that in the event of a failure to carry out the objects of the mandate, the corporation, "after deducting its expenses," shall return the fund to those who gave it. This clearly requires and demands an account; and surely it will not be contended that where a number of persons have constituted a common agent for a common purpose each of them can compel a separate accounting to himself. In such a case the agent owes but one account. In the nature of things, it would be impracticable to determine the *pro rata* of the numerous claimants otherwise than *in concursu*. They all have a common interest in the expense account of the corporation, and a like interest in testing the reality and amount of their respective claims upon the common fund. Any other course would consume the fund in costs of litigation; for the corporation would have to establish its expenses account in every suit, and for its own protection, and that of other contributors, would have to employ counsel to scrutinize each separate claim in the hundreds of suits that would be brought. We have seen that the Louisville corporation is claiming the whole fund; while numerous suits are brought in different State courts by different persons claiming small and fractional amounts thereof. This court, in the absence of express legal provision, has the power to proceed and decide according to equity. C.C. 21; 1 An. 138. We think the plaintiff's petition discloses a cause of action, and that the facts in this record entitle it to relief.

But while the plaintiff has rights entitled to protection, it has also obligations which it is bound to fulfill. The donors of the funds in its hands have an undoubted right to demand and require an account of its stewardship; and if by the terms of its charter the corporation has failed to accomplish the object of the trust, it must restore the fund to those who gave it. We shall therefore remand this cause.

It is therefore ordered, adjudged, and decreed that the judgment appealed from is reversed, and plaintiff's injunction is reinstated. It is further ordered that this cause be remanded to be proceeded with as follows: That the plaintiff, "the Louisiana Board of Trustees of the American Printing-House for the Blind," do within sixty days from the filing of this decree in the court below render a full account of its receipts and expenditures of the fund in its hands; that notice of the filing of said account be advertised in two daily papers of New Orleans for sixty days, and calling upon all persons claiming rights to or upon said fund to come forward and assert the same within said delay; that at the end of said delay the court *a qua* proceed to try and determine the rights and claims of all parties appearing, and to render judgment as their rights shall require; costs of this appeal to be paid by appellees.

No. 7262.

CITY OF NEW ORLEANS VS. METROPOLITAN LOAN SAVINGS AND PLEDGE BANK.

A license to conduct a banking business does not authorize the carrying on of a pawnbroking business.

The sixth section of the act 31 of 1876 known as the "premium bond" act limiting the taxing power of the city of New Orleans refers to taxes on property, and not to those imposed by way of licenses on occupations, etc.

A PPEAL from the Sixth District Court, parish of Orleans. *Rightor, J.*

Sam. P. Blanc, City Attorney, for plaintiff and appellee.

Braughn, Buck & Dinkelspiel for defendant and appellant.

The opinion of the court was delivered by

SPENCER, J. This is a suit to recover of defendant two licenses—one for \$1000 for its banking business, and one for \$400 for its business as pawnbroker. There was judgment below for plaintiff, and defendant appeals.

It is admitted that the defendant in connection with its banking "loans money on pledge or pawn of personal property, such as watches, jewelry, etc., and issues pawn tickets according to the custom of pawnbrokers."

Defendant contends, in substance—

First—That its pawnbroking business is legitimate banking, and that it is carried on as part of its banking business. In other words, that under a license as a bank, it has the right to deal as a pawnbroker.

Second—That the authority of the city to levy the licenses claimed under its charter is repealed by the premium bond act limiting the taxing power of the corporation to fifteen mills on the valuation of property.

As regards the first proposition, we are unable to concur in the views of appellant's counsel. The business of banking, properly so-called, and that of pawnbroker, are as distinct and well defined as that of wholesale and retail merchant, or any other two recognized lines of business. There can be no doubt of the right of the defendant to carry on the double business of banking and pawnbroking, just as a retail clothier may carry on the tailoring business. But the two occupations are, in commerce, and *in law*, regarded and treated as distinct. There is no doubt of the power of the Legislative authority to establish these distinctions. It has done so, and in so doing has simply recognized a well known commercial classification. The ordinances of the city require any person or corporation carrying on two trades or occupations to pay a license for each.

Second—The sixth section of act 31 of 1876, commonly known as the "Premium Bond" act, limits the taxing power of the city to fifteen mills on the dollar of the assessed value of property. This clearly refers to taxes on property, and not to these imposed by way of license on occupations, trades, and professions.

We see no reason to doubt the correctness of the judgment appealed from, and it is affirmed with costs.

Rehearing refused.

No. 7441.

SUCCESSION OF W. R. STONE. OPPOSITION OF CREDITORS.

An administrator who allows the money of the succession to remain in the hands of a commission merchant becomes personally liable for the money if it is lost by the failure of the commission merchant.

The lessor has a right of pledge on promissory notes that are the property of the lessee, and found on the leased premises.

The succession of a deceased person is bound for the rent due for the unexpired term of a lease made by the deceased.

The mere assent of a lessor to a sublease made by the lessee does not have the effect of releasing the lessee and substituting the sublessee in his place.

The lessor is entitled to recover from the succession of the lessee, on account of rent due for the unexpired years of the lease, only what balance of that rent shall remain after deducting from it eight per cent per annum thereof.

The principal has no privilege on the property of his deceased agent's succession on account of money of the principal collected by the agent and not paid over.

The language of the Code of Practice requiring the administrator of an insolvent succession to call a meeting of creditors to decide on the mode of selling its effects, is permissive, and not mandatory.

The bond of an administrator is an entirety, and is not to be canceled in part until the whole gestion is completed.

A PPEAL from the Parish Court of Madison parish. *Dennis, J.*

A. L. Slack for administrator and appellant.

G. L. Hall for tutrix and appellee.

Seale & Morrison and *Farrar & Spencer* for opponents and appellants.

The opinion of the court was delivered by

MANNING, C. J. James A. Stone, as administrator of W. R. Stone's succession, filed his account, and tableau of distribution of its assets, which is opposed by the assignees of the Bank of Louisiana and of Dudley & Nelson, on various grounds, some of which have been abandoned. Those now insisted on are the following;

1. The administrator debited the succession with \$174.22, the sum

in the hands of R. T. Buckner & Bro. in March 1878, which was lost by their failure.

In July 1877 there was a balance in the hands of the Buckners, due the succession, of \$382.17, which was transferred to the credit of J. A. Stone, administrator, who permitted it to remain there. Thereafter, it was at his risk. Persons holding money in a fiduciary capacity, are not permitted to leave it with commission merchants merely because it is convenient, or because as individuals they choose to deal with their own money in that way. The administrator must be charged with \$174.22 the sum thus lost in March 1878.

2. A claim in favour of Joseph Noland for \$2,400.00 was placed on the tableau as a debt, privileged upon certain notes amounting to \$2,504.65.

Noland had leased to W. R. Stone the Omega landing and contiguous grounds for ten years, commencing January 1, 1875, at a rental of \$300 per annum, there being a stipulation, withholding the authority to sublet save with the lessor's consent. On February 3, 1877, two days before his death, the lessee sold to John B. Stone his storehouse and fixtures on the Omega landing for \$1,200.00—his dwelling-house and outbuildings on same grounds for \$1,500.00—the Noland lease for its unexpired term, ending Dec. 31, 1885, "for the price and sum of \$300 per annum, amounting to \$2,500.00"—horses, mules, waggons, etc. for \$1,210.00—and his stock of goods, at inventory prices, for \$1,839.00—amounting in the aggregate, the bill of sale reads, to \$8,149.00. The correct aggregate is \$8,249.00, which countenances the conjecture that the price of the lease should have been stated at \$2,400.00, as it would be for eight years at the rental mentioned, and this being corrected in that way, the aggregate of the whole purchase is properly summed up. Notes were given for this sum total—nine notes for varying sums, the smallest of which is for \$75.00, and the largest for \$500.00, all aggregating \$2,504.65 and payable January 1, 1878, and three notes for \$1881.45 each, payable on the first days of the years 1879, 1880, and 1881.

The privilege of the lessor upon the nine notes is recognised as being movable effects of the lessee, found on the property leased, and the opponent contends that the concluding paragraph of art. 2675 of the Civil Code (new no. 2705) restrains the application of the privilege and right of pledge to the furniture or merchandize in the house or apartment, if it be a store or shop. The contrary was expressly held in *Mathews v. Creditors*, 10 Annual, 718, where it was said that the clause which confers the privilege is absolute and unambiguous, and the words 'movable effects' were too comprehensive to admit of doubt or discussion with reference to their application, and that the concluding clause of the article appears rather illustrative than restrictive in its character.

Succession of Stone.

It was also said, there was no good reason why the assets of a banker, so far as they are susceptible of being pledged, should not be subjected to the same right of pledge as merchandize in a store, and *Bazin v. Segura*, 5 Annual, 718, is cited as a correct exposition of the article.

As a matter of fact, it must appear by proof that these notes were found on the leased property, and opportunity will be given to supply that proof.

There is some discussion in the briefs upon the questions, whether the succession is not entirely relieved of the debt for the future rent, and whether Noland, in assenting to the lease, did not accept the new lessee, or the purchaser of the unexpired term, as his debtor in the place and stead of the original lessee. We do not think either position is tenable. The succession of the deceased is bound to fulfill the contract for the payment of the rent, and it is doubly bound so to do in the present case, since the price of the unexpired term of the lease has gone into its assets. Noland's assent to any subletting was merely a stipulation to prevent a sub-lessee, whom he was unwilling to occupy the premises, from acquiring the contract. It is also contended that the price of the lease, recited in the act of sale, was a premium on the lease, upon the authority of *Daquin v. Amant*, 14 Annual, 217. The ruling in that case was confined to a judicial sale of the lease, and it may also be said, that the price mentioned in the sale is the same sum the original lessee was bound for.

But what is the present amount of the debt which the succession owes for the lease? The annual rental is \$300.00, payable each year to 1885. It is very clear that the succession does not owe now the whole rent. The death of the lessee does not alter the maturity of his stipulated annual payments, and cause the whole rent for eight future years from his death to be at once exigible. Nor can his succession be kept open during all those years, waiting for the annual payments to mature. In the absence of positive law upon this matter, we must be guided by equitable considerations, and we can revert to the rules established for other matters somewhat analogous to it.

The Code provides that where property of a succession is sold partly for cash, and partly on a credit, on a partition of the proceeds of the sale, the whole amount shall be reduced to its cash value, by deducting from the whole sum to be paid eight per centum per annum, and those heirs who require their portion to be paid in cash shall receive it on the whole amount thus reduced. art. 1264 new no. 1342. The creditor of this succession, who is only entitled to the annual payment of \$300.00 for several years to come, must have his claim reduced to its present cash value, by deducting therefrom the same per centum per annum, calculated as is provided in the case of heirs.

3. Mrs. Harvey is recognised as a creditor for \$1,025.20. Her counsel admits it should be reduced by \$32.25. The deceased Stone acted as her agent, and received this sum of money for her—collected her rents and accounts. The administrator admitted it as a privilege. Upon what? It appears the privilege is supposed to rest upon any money in Stone's possession. There was none found there so far as this record informs us. It is not alleged that he kept her money separate and apart, labelled and capable of identification. It is clear that his succession is liable for the sum he collected for her, and it is equally clear that she has not a privilege upon any special funds for its payment. There is no evidence of the existence of any special fund. The debt is an ordinary one. *Longbottom v. Babcock*, 9 La. 44. *Whatley v. Austin*, 1 Rob. 21.

The opponents and appellants have filed an assignment of errors on two points of law, apparent on the face of the record, as they allege.

1. That the succession was insolvent, and the administrator was bound to apply for an order convening the creditors to deliberate on the most advantageous mode of selling the effects. The inventory of property and assets amounted to \$26,450.70 and the debts were \$26,716.61. The language of the Code of Practice is permissive and not mandatory. art. 1038.

2. The judgment of homologation directs the cancellation of the administrator's bond to the amount of \$13,316.84, that being the portion of his account which was homologated.

This is error. The bond is a whole, an entirety, and is not to be cancelled in part until the whole gestion is completed.

3. A claim of R. T. Buckner & Bro. for \$6,552.03 is said to have been secured by 'mortgage' of a life policy of \$10,000.00. Probably a pledge is meant. In either case proof should be supplied of that fact, and if any portion of the policy belongs or belonged to the succession, such portion must be accounted for.

Another claim for \$635.75 is said to be placed on the account as a privileged debt. There must be supplied proof, both of the existence and validity of the claim, as well as of the privilege.

The sale of the three notes of \$1881.45 each, for the meagre sum of \$350.00, and the purchase of them by the maker, needs explanation and justification. Unless explained and justified, the administrator may be responsible for their actual value. It does not escape observation, that while the nine matured notes are recognised as subject to a privilege for the payment of nearly as many unmatured instruments of rent, the non-matured notes are sold for a paltry sum. In the next trial, the administrator and the opponent will have an opportunity to subject this

Succession of Stone.

part of the gestion to a more satisfactory examination than has yet been done.

It is ordered and decreed that the judgment of the lower court is avoided and reversed as to the several matters or items set forth and adjudged in this opinion, and the cause is remanded to the lower court for the amendment of the Tableau of Distribution and the Account, so far as definitively passed on herein, and for a new trial of the same as to those left open for further examination and proof. It is further ordered that the succession pay the costs of appeal.

No. 7422.

SUCCESSION OF ELLA ROTH—PROBATE OF WILL.

The fact that there are witnesses to an olographic will does not invalidate it, nor deprive it of its olographic form.

The declarations of two credible persons, that they recognize the handwriting of a will as that of the testator, and who derive their knowledge that it is his handwriting from having often seen him write and sign during his lifetime, are essential to the probate of an olographic will.

But if the probate of a will is contested, and the testimony of two persons thus deriving their knowledge of the handwriting of the testator is supplied, such testimony may be supplemented and strengthened by the production of original writings and the evidence of experts by comparison.

Women are absolutely incapable of being witnesses to testaments, but they are competent witnesses to prove the handwriting of a testator, when that fact has to be established on the probate of a testament.

A PPEAL from the Parish Court of Iberville. *Cole, J.*

A. & E. B. Talbot for Gustave Roth, appellee.

George Wailes and Barrow & Pope for opponent and appellant.

The opinion of the court was delivered by

MANNING, C. J. Ella Roth died on September 5, 1878, and a few days afterwards her husband presented her will for probate. It is in these words;—

Iberville Aug 22nd 1878
him

I this day make my will in favor of my husband—I give_A all of my property that the allows me.

ELLA ROTH.

Witness

BETTIE C. GOURRIER

CLAY GOURRIER

The deceased was childless, and her only heir is her mother, who having been cited at the probate, appeared and opposed it, alleging that

the paper was not a will, being null and void for want of the requisites and formalities prescribed by law for an olographic testament.

The will was written on a blank page of an old account-book. The yellow fever was prevailing, and Mr. Roth and his wife shared the general apprehensions which the malignity and fatality of its attacks had inspired. They spoke together of making their wills. He went to his desk, and wrote his, his wife being in the same room, and asking him to bring it to her when he was done. Having finished the writing, but not yet having signed it, he took the book to her, and she wrote hers lower down on the same page, evidently copying his, and only substituting the word 'husband' for that of 'wife'. Mr. and Mrs. Clay Gourrier were the guests of the Roths at that time. They were called in and told what had been done. Mr. Roth then signed his will, and Mrs. Roth signed hers, in the presence of the Gourriers, both of whom attested both writings. Mr. Roth carried the book out of the room, and discovered a few minutes afterwards that the word 'him' was omitted. He took the book back to his wife, and called her attention to the omission, when she immediately inserted that word above the line, by an interlineation. It does not appear whether the Gourriers were then present.

This is the account of the manner in which the wills were made, as narrated by Mr. Roth and the Gourriers, the latter speaking only of those incidents that were personally observed by them. An attempt was made to prove that the writing was a forgery, and some of the witnesses said as much, while others thought that only the word 'him' was forged. A large number of witnesses were examined, and we have gone over the whole testimony more than once, and are satisfied that the imputation upon the husband is as unfounded as it is cruel. Nor can we participate in, or approve the observation of the opponent's counsel that, "when a will in favour of the husband is produced, it cannot be wondered that all persons look with doubt at its genuineness and expect unequivocal proof." This is said, after reciting the testimony of Mrs. Marionneaux, the mother; but neither as a general proposition, nor a special one, elicited by and founded upon that testimony, when compared with that of the other witnesses, can we wonder at the provision of the will. Mrs. Roth was a young wife, and a young woman of only nineteen years, and being childless, it would have been wonderful if she had desired to give what little she had, and it was not much, to any other than her husband. Neither do we attach any importance to the interlineation, because the first sentence indicates the person whom she is making her universal legatee, and the word interlined is not absolutely essential to the designation of that person, when the will is read as a whole.

These questions are subordinate in importance to that of the mode

Succession of Roth.

of proof, which is presented by the opponent's bill of exception to the admission, by the lower court, of original writings and signatures of the deceased, and the testimony of witnesses, sworn as experts, comparing these writings and signatures with the will. The question thus presented for solution is;—can an olographic will be proved in any other manner than by the declarations of two credible persons, who recognise the will as being wholly in the handwriting of the testator, and as being dated and signed by him, and who derive their knowledge of his handwriting from having often seen him write and sign his name?

The fact that the names of witnesses are appended to the will neither invalidates it, nor deprives it of its olographic form. Andrews' case, 12 Mart. 714. And the probate of it must be that required for an olographic will.

Reasons *ab inconvenienti* and *ab absurdo* crowd upon us against the propriety and necessity of requiring the knowledge of a testator's handwriting to be derived exclusively from having often seen him perform the manual act of writing, when his will comes to be proved. An olographic will of a woman can rarely be proved in this way, and the handwriting of very few men is known from having often seen them write. Take an illustration that naturally suggests itself to us. The lawyers practicing in this court become familiar with the handwriting of the Justices from reading their Opinions in manuscript, and could swear to its genuineness with undoubting certainty, but very few of them have often seen either of us write or sign our names. In the probate of the will of either of us (any early need of which may Heaven forefend) those who have the most certain knowledge of our handwriting could not testify to its genuineness, because their knowledge was not acquired by having seen the manual act of writing often done. The absurdity too of requiring a particular mode of proof for the purpose of obtaining certainty is repulsive, when it is apparent that such particular mode is less certain than several others. Knowledge of handwriting is not acquired as readily, or as accurately, by seeing one write, as it is by inspecting what one has written. A long-continued epistolary correspondence with one, or frequent inspection of his books or accounts or other writings through a series of years, affords a more reliable basis for judging of his handwriting than the mere act of seeing him write. The act of looking at one writing is short. A glance, and you turn away. But the act of reading one's letters, or of inspecting one's accounts or other writings, is long and protracted. The testimony of handwriting by comparison is also more reliable than that acquired in the way we are treating of, and our law wisely favours that mode in a manner that presents a striking contrast, to the suspicious look with which the common law regards it, and not only favours but expressly authorizes its adoption

in the aid, or the absence, of other modes, except when one of these latter is essential. Civil Code, art. 2241 new no. 2245. Code Prac. art. 325. Yet, this mode and all others, save the single one of often seeing the manual act of writing, is excluded, for the purpose of probate, by the unequivocal language of the Code, thrice repeated, as we shall presently shew, in as many several redactions.

If any liberty of interpretation were permitted, we might disregard the letter of the law, and infuse into it a more liberal spirit. But laws touching the making of wills, and their proof, have ever been held rigorously *stricti juris*. Sir William Blackstone says, a man has not a natural right to make a will, for because he has kept all other people out of the possession of certain property during his life, constitutes no reason why he should be allowed to designate who shall be its exclusive possessor after his death, but rather the contrary. Certainly, all formalities of wills are universally required to be strictly observed. The difference between the laws of different countries is, that some require more formalities than others. So, the mode of proof is equally obligatory. In some of the States, a will of personalty is good with two witnesses, but a will of realty requires three; and therefore a testamentary disposition of both kinds of property in one paper, having only two witnesses, would be a good will of the one, but would be entirely void as to the other. These rules are arbitrary, and like that of our Code touching the kind of proof of olographic wills, unreasonable.

The *Travaux Préparatoires* for the Code of 1825, consisting of additions and amendments to the old Code, proposed by those who had been charged with that work under the resolution of the General Assembly of March 14, 1822, suggested an alteration of the Code of 1808 as to olographic wills. The articles of the Code of 1808 provided that the olographic testament must be made by the testator himself, without the presence of any witness, and should not be valid unless it be entirely written, signed, and dated with the testator's hand, and is subject to no other form. c. vi. s. 2. art. 103. It must be acknowledged and proved by the declaration or affirmation of two credible witnesses, who must attest that they recognise the testament as being entirely written, dated, and signed in the testator's handwriting, as having often seen him write and sign during his lifetime. *Ibid.* art. 160.

The amendment proposed to the first article was, that it should be necessary to the validity of an olographic testament, not only that it be written, signed, and dated entirely by the hand of the testator, but that it have besides the signatures of two witnesses, to whom the testator shall declare that the paper, that he offers to them to sign, is his testament.

The reasons given for the alteration were, that the art of counter-

Succession of Roth.

feiting writings had attained such perfection, that certainty was no longer possible if the only proof of the verity of a testament was proof of the handwriting of the testator. *Travaux Préparatoires*, p. 215. The suggestion was not adopted, and the article of the Code of 1808 was simplified and condensed in the form we now have it in art. 1581, new no. 1588.

But there was no suggestion of any alteration whatever in the other article, (*Trav. Prép.* p. 220) although that proposed to the first related not only to the proof, but to the kind of proof, and it was literally transcribed as art. 1648 of our present Code, new no. 1655. The first article relates to the confection of a will—the second relates to its probate, and requires the knowledge of the handwriting of the testator of the two credible persons who are offered to prove it, to have been acquired by having often seen him write and sign during his lifetime.

This court held such evidence essential in *Suc. of Eubanks*, 9 Annual, 147, where it was said—the appellee contends that the testimony of witnesses, that Mrs. Eubanks had told them the will was entirely written by her, satisfies the law. We think otherwise. Art. 1648 of the Code is express, that the only proof of olographic testaments is the testimony of two witnesses, that they recognise the handwriting as having often seen the testator write and sign during his lifetime. And this has been reiterated in *Lucas v. Brooks*, 23 Annual, 117 and *Fuentes v. Gaines*, 25 Annual, 85.

The proof of this will may be epitomised as follows. Mr. and Mrs. Gourrier each saw the testatrix sign the will. It was written entirely, and dated, out of their presence. He never saw her write except on the single occasion when she signed this will, but has seen orders that were written by her, and also her writing in her books. Mrs. Gourrier is acquainted with her handwriting only from seeing her sign the will. She knows the will was written by Mrs. Roth because she told her it was written by herself. Alice Porter saw the testatrix write, and sign her name, about five or six times, and that is 'often'—saw her write notes and songs, and a piece of poetry—received letters from her about twice a month for a year—and recognises the will as being dated, signed, and written in the handwriting of Mrs. Roth. Linda Porter saw the testatrix write her name—received letters from her about once a month, for how long is not stated—saw her write a list of articles for purchase, and saw her write her own name, the name of witness, and of some friends, to pass away the time—cannot state the number of times she saw the testatrix sign her name, but saw her do it often, and recognises the will as being written, dated, and signed by her. These last two are the witnesses that testify of the handwriting from personal knowledge, derived from having often seen her write and sign her name.

Some of the letters to Alice Porter were preserved by her and were offered in evidence, as was also the piece of poetry, and a notarial Act signed by Mrs. Roth, the original of which is brought up with the record. Witnesses were sworn as experts, some of whom, on comparison of the signatures and handwritings, testified that they were the same and were written by the same person, while others swore the contrary. All of this testimony of experts and the writings submitted to them, was objected to by the opponent on the ground that such mode of proof is not permissible for the probate of an olographic will, but only the testimony of persons who derive their knowledge of the handwriting of the testatrix from having often seen her write and sign her name.

We think the testimony was admissible, as supplementing the proof already adduced of two persons who had derived their knowledge of the handwriting in the manner, and from the source, indicated by the Code; and in rebuttal of the testimony of the opponent, impugning the authenticity of the will, as being forged. Such testimony cannot by itself prove an olographic will, but when the handwriting has been established in the mode prescribed by the Code, and an Opponent controverts the fact thus established, by an allegation of forgery or other want of authenticity, the declarations of the two witnesses as to the handwriting may be supported by any other mode of proof, but otherwise, it is inadmissible.

The due probate of the will therefore rests primarily upon the testimony of the two Misses Porter, since neither Mr. nor Mrs. Gourrier saw the testatrix sign her name except when she signed the will, and never saw her write except on that occasion. The opponent has not raised any question of the admissibility of the testimony of these witnesses, on such an issue as this, because of their sex. But we are necessitated to consider it.

Women are absolutely incapable of being witnesses to testaments, says the Code. art. 1584 new no. 1591. Are they also incapable thereby of being witnesses, when a testament is offered for probate, and on the trial of the issue presented by the opposition thereto?

The laws touching the capacity of witnesses underwent a sweeping alteration in 1867, (Sess. Acts, p. 143) and again in 1868. Sess. Acts, p. 269. The act of this last year was incorporated bodily in the Civil Code in 1870, and was substituted to art. 2260 of that Code. new no. 2281. It enacts that the competent witness of any covenant or fact, whatever it may be, in civil matters, is a person of proper understanding. The same Code contains the prohibition of women being witnesses to a will, and the two articles must be construed together, or if irreconcilable and naturally repugnant, the last must alone stand. They are not irreconcilable.

Succession of Roth.

The act of 1868 removed all those restrictions and prohibitions, touching the capacity of witnesses which formerly prevailed, and which were adhered to with pertinacity and enforced with rigorous precision. It leaped with a single bound to the very front of these speculations with which Mr. Bentham had startled the legal and legislative world: and imitating what had been done in other countries and other of the States, accomplished with one stroke the emancipation of the law of evidence from the thrall which had impeded the ascertainment of truth.

Any person of proper understanding, without regard to age or sex, is made a competent witness, in a civil matter, of any fact whatever it may be. The verity and genuineness of the handwriting of a testator is a fact, and the probate of a will wherein such fact is to be proven, is a civil matter, and therefore a woman of proper understanding is a competent witness thereto and therein.

Judgment affirmed.

DISSENTING OPINION.

DÉBLANC, J. The olographic testament is valid, when entirely written, dated and signed by the hand of the testator. How must it be acknowledged and proved? According to the *directory* provision of the Code, it must be acknowledged and proved by the declaration of two credible witnesses, who must attest that they recognize the testament as being entirely written, dated and signed in the testator's handwriting, as having OFTEN seen him write and sign during his lifetime.

In the matter of the succession of Daniel Clark it was correctly held that "the rules for the opening and proof of testaments—commencing at article 1649 of the Code, do not pronounce the penalty of nullity for their non-observance, and they nowhere say that other cases may not arise in which the strict letter of these rules may not be inapplicable, and the judge may not receive, in extraordinary cases, other equally satisfactory proof that the requirements of the law have been fulfilled."

11 A. 128.

In "State vs. Ames," the opinion of experts was taken as to the genuineness of the will, and the court said: "We have had, presented for our inspection, the act itself with letters acknowledged to have been written by Joseph Field—the testator—and also the checks proved to have been signed by him. We have compared the handwriting and the signatures, and—after full consideration of the whole—we think the validity of the act established, and that it should be maintained."

23 A. p. 75.

I believe that any proper evidence, calculated to convince the court and to conclusively establish that the testament was entirely written, dated and signed by the testator, should be heard and admitted. Otherwise, many a testament, valid in substance and valid in form, uncontested and incontestable, would—nevertheless—remain among the archives of the court, a mute confidant of the last wishes and legitimate dispositions of a deceased party.

Were one—impelled by the apprehension that the proof and execution of his testament might be objected to and opposed—to carry it himself to the judge of the probate court, declare in his presence and in presence of his clerk, that it was entirely written, dated and signed by him, ask the judge and the clerk to read it, and, after having read, to sign it; and this done, leave it—until his death—in the possession of those officers. Under these circumstances, could the judge—when asked to acknowledge it and order its execution, justly answer: this—beyond any doubt—is the testament of the deceased; it was handed to and kept by me: my signature, that of my clerk are attached to it; I have read it before, I recognize every word which it contains, I know from the testator's own declaration that it was entirely written, dated and signed by him, but I have not often seen him write and sign during his lifetime, and, on that account and for no other reason, I cannot acknowledge it; the letter of the law—blind and inflexible sentinel—stands between the will and its execution.

It cannot be successfully contended that a court is powerless to enforce that which it expressly authorizes, and to receive—as proof of the genuineness of an act which is valid in form and valid in substance, the evidence which—under other circumstances—it would consider as sufficient to deprive one of more than any right created by human law, his liberty—of more than his liberty, his life.

Of the sacred duties of a court, the most sacred is to protect, against the petty interests of this world, the last will of the departed, and a too rigid construction of the articles of the Code which relate to the proof of olographic testaments, would—often—impede the performance of that duty and defeat the most lawful dispositions.

For these reasons, I respectfully dissent from the opinion read by the Chief Justice, but concur in the decree rendered by the Court.

CONCURRING OPINION.

WHITE, J. I concur in the decree in this case, but not in the opinion. Inasmuch as the Court finds that the proof required by C. C. 1655 has been adduced I do not join in the opinion because it expresses views as

Succession of Roth.

to what would be the rule were such testimony not in the record, thereby passing on a purely hypothetical issue—not necessary to be decided—not involved in the conclusions leading to the decree. In my judgment a safe rule for courts is to express opinions only as to indispensable matters, and not by anticipation to put of record opinions to govern cases which may arise.

No. 7411.

SUCCESSION OF S. O. RHEA.

A probate judge is disqualified to pass on the homologation of an executor's account when he is put down on the account as creditor even of a paid debt.

A PPEAL from the Parish Court of East Feliciana. *Brame, J.*

Succession not represented.

W. F. Kernan for opponent and appellant.

The opinion of the court was delivered by

DEBLANC, J. On the 20th of December, 1878, D. C. Hardee, the executor of the last will of S. O. Rhea, filed—in the parish court of East Feliciana—the final account of his administration of the succession of said deceased, the whole of which was absorbed by exclusively those of its creditors, whose claims were secured by mortgages and privileges.

On the 20th of December, the clerk of the parish court prepared a notice which—on the 21st—was published as prepared, and in which—instead of D. C. Hardee—D. C. Harden is represented as having filed the final account of his administration of the succession of S. O. Rhea.

On the 7th of January 1879, the account thus filed by D. C. Hardee was homologated by a decree of the parish court, which appears to have been rendered, and which was signed at that date. During the term at which said decree was rendered and signed, but *fourteen days thereafter*—on the 21st of January—William R. McKewen, a creditor of the deceased, whose acknowledged claim is not carried in the homologated account, moved for a new trial of the case, on the grounds:

1. That—as required by law—notice of the filing of the executor's account, was not published during ten days.
2. That, if any notice was published during the required term, it was insufficient in form.
3. That there was no legal proof that the notice of the filing of said account has ever been published.
4. That the parish judge, who rendered the judgment of homologation, was placed on the executor's account as a creditor of the suc-

cession, and that, being personally interested, he was incompetent to render that judgment.

The application for a new trial was overruled, and McKewen appealed. He urges, here, and against the validity of the decree of homologation, the identical objections which he urged in the lower court. Such as it is, that appeal is before us.

The appellant did not oppose the executor's account, nor does he now even allege that any one of the claims thereon classed is incorrect in amount or inferior in rank to his own; but he is a creditor of the estate, this is acknowledged; and though—from his own pleadings and the vouchers introduced in evidence—he can, it seems, derive no advantage from the reversal of the decree which he assails, we are, nevertheless, constrained to reverse it.

That decree is invalid, and for only one reason: the parish judge was—*apparently*—interested in the matter upon which he passed. It is true that his claim against the estate was not carried in the executor's account as due, but as paid—that his satisfied claim, which appears to be as reasonable as just, was a privileged one—that it was not and—in all probability—shall never be contested; but the judge had, however, to decide, or rather to recognize that it had been properly paid, and—to so decide or recognize—he had to do that which—when personally interested—the judge is—by an imperative clause of the constitution—commanded not to do.

The decree of a court should be, not only impartial, but no pretext should—as a stepping-stone—be allowed to stand between its impartiality and even the most unreasonable suspicion—for, as well said, praise is without feet and the wings of blame are swifter than the winds.

We entertain no doubt that—in this case—the parish judge felt as disinterested as we do, and—were it not for the constitutional prohibition already referred to, and the apprehension of establishing a dangerous precedent, one which—hereafter—might be invoked by less disinterested judges, we would not hesitate—with the evidence now before us—to concur in the decree rendered by the parish court: but, in the proceedings instituted by the executor, and on which he—the executor—was a plaintiff, the parish judge was one of the defendants, and he should have called upon his colleague of the district court, to try and determine the tacit issues created by the institution of those proceedings.

It is—therefore—ordered, adjudged and decreed that the judgment appealed from is annulled, avoided and reversed, and this cause remanded to the lower court, to be proceeded with according to the views herein expressed and according to law: the costs of the appeal to be paid by the succession of S. O. Rhea.

Hammett vs. Sprowl et al.

No. 7338.

GEORGE HAMMETT VS. WM. SPROWL ET AL.

In a suit to revive a judgment the defendant can not set up any grounds of defense which would not, if true, have rendered the judgment absolutely null and void. Where an exception filed by the defendant was treated by the court, the plaintiff and himself as an answer, and on that assumption the case was tried, and judgment rendered, he can not afterward, in a suit to revive the judgment, complain that no default against him was entered.

Where a suit instituted in the court of one parish and there prosecuted to a judgment, is removed by an act of the Legislature to the court of another parish, which is invested by the act with full jurisdiction of the case, the latter court has jurisdiction of the suit to revive the judgment in said suit.

One who has a judgment against several persons jointly, or *in solido*, has a right to sue for the revival of the judgment against one only of his judgment debtors.

In a suit to revive a judgment *in solido* against several persons, service of citation on one of the debtors will interrupt prescription of the judgment as to all.

A PPEAL from the Seventeenth Judicial District Court, parish of Red River. *Pierson, J.*

J. F. Pierson for plaintiff and appellee.

L. B. Watkins for defendant and appellant.

The opinion of the court was delivered by

SPENCER, J. Plaintiff brought suit in the district court of Natchitoches parish on his tutor's bond, whereon Wm. Sprowl and Peyton R. Bosley were sureties *in solido*. The latter being dead, his sons John R. and H. S. Bosley were sued as his unconditional heirs. Said suit resulted in a judgment, in 1867, in favor of plaintiff for some \$12,000 against Sprowl for the whole and *in solido* with the two heirs of Bosley, who were each condemned to pay one half, his virile share of said debt. At that time H. S. Bosley was cited as residing in Bossier parish, and was served there personally with citation, the other parties as residing in Natchitoches.

Judgment was made final on default. In 1871, the parish of Red River was created out of the territory taken from Natchitoches, Bossier, and other parishes.

It is shown that the defendants in said suit resided within the territory thus now embraced within Red River.

By act 78 of 1873, the clerks of district and parish courts of Natchitoches and the other parishes named, were directed "to transmit forthwith to the clerks of the district and parish courts of Red River all petitions, answers, documents and papers appertaining to suits wherein the defendant or defendants reside within the parish of Red River, *whether said suits be settled or unsettled.*" "That the district and parish courts of Red River shall have as full and complete jurisdiction over the suits so transferred, as the said courts of the different parishes from whence the same were transferred, as now under the law."

The suit now before us is one to revive the judgment above mentioned, and is brought in the district court of Red River. In this suit to revive Wm. Sprowl has not been cited, being dead and his estate shown to be utterly insolvent. John R. Bosley made no appearance, no default was entered against him, and he has not appealed. H. S. Bosley appeared and, reserving his right to answer, filed numerous "peremptory exceptions" and the plea of prescription of ten years, and prayed that plaintiff's suit be dismissed and for costs and general relief.

The grounds of the exception are—

First—Want of jurisdiction in the court.

Second—That two of the defendants are cited as a firm, "J. R. & H. S. Bosley," instead of individually.

Third—That the suit can not be maintained without citation to Sprowl or his heirs.

Fourth—That the petition does not disclose in what court the judgment sought to be revived was rendered.

Fifth—That the court which rendered the judgment alone has power to revive it.

Sixth—Prescription of ten years.

The case was thereupon set down for trial, evidence introduced, and judgment rendered for plaintiff as prayed for. H. S. Bosley filed a motion for new trial on the ground that the judgment rendered was "contrary to law and evidence," and appeals. In this court he has filed an elaborate assignment of errors, which so far as not a repetition of the peremptory exceptions are in substance as follows :

That no default was entered against him or other defendants in this cause. That the judgment sought to be revived was predicated on a previous one against the tutor, which last was prescribed when the former was rendered. That the judgment sought to be revived was rendered on insufficient evidence. That H. S. Bosley at the date of said judgment was resident of Bossier, as shown by the citation, and could not be sued in Natchitoches. That his obligation to pay his father's debts was a personal obligation, enforceable only at his domicile, and that said suit was not an action on the bond, but on his personal obligation as heir. That the original judgment against the tutor has never been revived, and is now barred.

We will dispose of this assignment of errors, so far as it attacks the original judgment sought to be revived, by simply saying that the grounds stated were all matters which should and could have been urged by way of defence thereto. That such matters can not be set up as defence in an action to revive. None of them, if true, would render the judgment absolutely null. Besides, appellant admitted on the trial below that at the date of said judgment in December, 1867, he resided

in Natchitoches parish. He was personally cited. *Connery vs. Rotchford, Brown & Co.*, 30 A. 692.

As regards the non-entry of default, so far as H. S. Bosley is concerned, it amounts to nothing. His exception was treated by the court, by the plaintiff, and by himself as an answer. The case tried, evidence adduced and decided. He moved for a new trial, and said nothing about there being no default against him. It is too late now to urge it.

This brings us to the case as presented below by the peremptory exceptions. The first and fifth grounds are substantially one—want of jurisdiction in the district court of Red River to revive a judgment rendered in Natchitoches. We have quoted the statute, which expressly gives to courts of Red River jurisdiction over the suit sought to be revived in this case. It puts the Red River court in the place and stead of the Natchitoches court; vesting it as regards this judgment, with the jurisdiction of the latter. Now what was under existing laws the power of the Natchitoches courts as regards this judgment? It was the exclusive right to *enforce* and to *revive* it. After the passage of that statute the court of Natchitoches could no more revive that judgment than it could enforce it by *fi. fa.* We regard a proceeding to revive a judgment not as a new suit, but simply as a proceeding in the same suit, to continue and keep alive a judgment rendered therein, and to furnish proof that it has not been satisfied or extinguished. But if it were conceded to be a new and substantive suit, it is manifest that it would have to be brought in Red River, where all the defendants reside. So taking either horn of the dilemma, the result is the same.

Second—The second ground is that the defendants "J. R. & C. S. Bosley" are cited as a firm. This is not true. The title of the suit at the head of the citation is, "Geo. Hammett vs. Wm. Sprowl and J. R. & H. S. Bosley." But separate citations, one addressed "to H. S. Bosley" and one "to J. R. Bosley," issued and were served.

Third—The petition states that the judgment was rendered by W. B. Lewis, judge of the parish of Natchitoches.

Fourth—Where a party has judgment either *in solido* or *jointly* against several persons, we know no rule of law that compels him to revive it against all. In the absence of such rule of law, we see no reason to enforce it as a rule of reason or equity. Why compel a judgment creditor to incur the delay, vexation and expense of citing insolvent and irresponsible parties, from whom he can never hope to obtain payment? Why require him to do this, any more than require him to sue all the makers of a solidary or joint obligation?

Sixth—The appellant also pleads the prescription of ten years in bar of this action. As we have seen, this judgment was *in solido*. Service of citation was made on H. S. and J. R. Bosley before the ten years

had expired. This interrupts the prescription as to the co-obligor *in solido*, Wm. Sprowl, who has not been cited. C. C.

The theory upon which appellant pleads prescription in this case, is not developed in the pleadings or argument. But we presume it to be this: payment of one co-obligor *in solido* discharges all the others. Prescription is a conclusive presumption of payment. Hence prescription, acquired by one co-obligor being a conclusive presumption of payment by him, inures to the benefit of all the others and discharges them.

It is not necessary for us to go into this vexed question, since as we have seen, no prescription has yet been acquired by any of the solidary debtors.

The judgment is affirmed at the costs of appellant.

MANNING, C. J. Upon the question of jurisdiction, I rest my concurrence upon the phraseology of the special act, which provides for the transfer of causes to Red River parish, "whether the suits be settled or unsettled." Without that sweeping provision, I think the Natchitoches court would have jurisdiction of the action to revive the judgment, because of the requirement that the citation for revival must proceed "from the court which rendered the judgment." And I think this is true, whether the defendants reside in the parish or not. The special law for the revival of judgments fixes the forum for that class of actions, and a removal of the defendants, or any of them, from the parish where they were sued in the original action, does not in any manner affect the jurisdiction of the court of that parish *quoad* the suit for revival.

No. 5866.

NICHOLSON & Co. vs. SUCCESSION OF N. R. JENNINGS.

Where a case has been remanded for the sole purpose of ascertaining whether prescription was interrupted, the lower court may nevertheless entertain an inquiry into the fact, (then for the first time put at issue) whether the plaintiff was dead before the institution of the suit; and if the fact is sustained by proper evidence the suit must be dismissed.

A PPEAL from the Sixth Judicial District Court, parish of Tangipahoa.
Kemp, J.

Hornor & Benedict for plaintiffs and appellants.

B. R. Forman for defendant and appellee.

The opinion of the court was delivered by

MANNING, C. J. This suit was instituted for the purpose of recover-

ing payment for square block pavement in front of the property of Jennings in this city. A judgment was rendered by default, and was confirmed, and an appeal by petition was taken therefrom, which was heard in 1873. In January of that year, the defendant executrix, appearing for the first time, filed in this court the plea or objection that she had never been cited in this case at any time, or in any manner; and if this should be overruled, she then pleaded prescription.

The court said, "these pleas are inconsistent. Pleading prescription is an appearance. The plea of prescription seems to be well founded, but as it was filed for the first time in this court, and the plaintiff requesting it, the case will be remanded for the purpose of allowing plaintiffs to prove an interruption." *Opinion Book.*

When the trial came on again in the lower court, the defendant made an exception of defective citation, or rather no citation, and another of no plaintiff, Nicholson being dead when the suit was filed, whereupon the plaintiff moved to strike out both exceptions, for the reason that the case was remanded for one purpose alone, viz, to try the plea of prescription. The lower court struck out the plea touching citation, and refused to strike out the other, and testimony having been heard thereon, it was proved that Nicholson was dead before the suit began. This plea was sustained, and the suit was dismissed. The plaintiff then asked leave of the court to offer proof shewing the interruption of prescription, but the defendant objected that the case was closed, and judgment entered, and so it was. An appeal was taken, and is now before us.

The defendant had never been cited. A careless clerk had issued the citation, without filling the blank where the name or other designation of the defendant should be, and afterwards some one attempted to supply the omission, but did it so clumsily that it was detected. We are inclined to think that the expression—the two pleas of defective citation and prescription are inconsistent—is not what was really meant, but rather that by pleading prescription as a defence, the party waived his right of exception of no citation. But the correctness of that decision is not before us. We may observe however, that there seems to be no good reason why the defendant should not have excepted for want of citation, and reserving the exception, in case it be overruled, have pleaded prescription, and this was what he did.

The judgment we have to review is one of dismissal because of the death of one of the plaintiffs before the institution of the suit. A judgment cannot be rendered in favor of a deceased person, nor against him. If either the plaintiff or the defendant had died after the institution of suit, of course it could have been revived in the name of or against his representative. The plaintiff's counsel, we presume, does

not controvert this position, but he insists that nothing could be inquired into under the order remanding the case, except the particular matter, for the ascertainment of which, it was remanded. To which we answer, that inquiry touching the fact whether there is any plaintiff at all, is always permissible. After an appeal is lodged in this court, a suggestion of the death of one of the parties to a suit always provokes an order staying the hearing until a representative of the deceased has come in, or been brought in, in his stead. When therefore an exception was filed in the second trial below of the death of the plaintiff, anterior to the institution of the suit, it was properly considered, and being sustained by proof, a dismissal necessarily followed.

The plaintiff cites State *ex rel.* Livingston v. Graham, 25 Annual, 629, as authority for his view of the restricted scope of the lower court's inquiry under the order to remand. An examination of that case shews that that point was not ruled on.

The judgment is affirmed.

No. 7373.

MONTGOMERY & DELONEY VS. N. BURTON, SHERIFF.

A mortgage creditor may redeem from a tax sale the property on which his mortgage rests, either in his own name, or in the name of his debtor, the former owner, and when the purchaser at the tax sale refuses to accept the sum necessary to redeem when tendered in the name of the former owner by the mortgage creditor, the latter may seize and sell the property to satisfy his debt.

A PPEAL from the Thirteenth Judicial District Court, parish of East Carroll. *Hough, J.*

Henry C. Miller for plaintiffs and appellees.

J. W. Montgomery for defendant and appellant.

The opinion of the court was delivered by

WHITE, J. Tucker, Carter & Co., being holders of a note of R. T. Keene, secured by mortgage, obtained on the second of June, 1873, a judgment thereon with recognition of mortgage. On the fourth of April, 1874, the mortgaged property was sold for taxes and bought by plaintiffs. In May, 1874, Tucker, Carter & Co. seized under *fi. fa.* and the plaintiffs enjoined, claiming ownership under their tax title.

Many questions have been raised in argument of counsel as to the validity of the tax sale as to whether before the expiration of the delay for redemption it was sufficiently inchoate so as to compel the creditor to attack it directly, upon all of which we need express no opinion, as our conclusion on one point alone is decisive of the case. On the third of

October, 1874, J. W. Montgomery, Esq., the counsel for Tucker, Carter & Co., called on Messrs. Montgomery & Deloney and tendered an amount adequate to redeem the property. He was asked whom he represented in making the tender, and upon his answering that he made the tender in the name of Keene, he was told that if he represented Keene he could redeem, and to use the language of one of the plaintiffs, "it being our opinion that he did not represent Keene, the matter went over." We think the tender should have been accepted, and that being made in the name of Keene was no objection to its validity. True, the mortgage creditor might have offered to redeem in his own name, but it is equally true that as such creditor he was for the purposes of the tender invested with the rights of Keene, was in fact his implied legal mandatary to that end. We understand from the conduct of the parties that the tender was practically refused if made in the name of the mortgage creditors, because although the plaintiffs knew when the tender was made that the one making it was the attorney of the mortgage creditors, who were then seeking to enforce their mortgage, the tender was refused unless made as the representative of Keene. The intention must have been to refuse the tender if Keene was only represented in consequence of the rights of the mortgage creditor as such, because although these rights were known the tender was refused because in the opinion of the holders of the tax title the mortgage creditor did not as such represent the divested owner for the purposes of redemption. These conclusions are made manifest when it is noted that the offer and refusal were made before this court had recognized the right of a mortgage creditor to redeem. The tender having been improperly refused, of course it was for all the purposes of the defendant's rights just as if it had been accepted, and the only question remaining for our conclusion is the consequences of the tender upon the rights of the parties. Whether a tax title is inchoate or not until the delay for redemption need not, as we have said, be now examined, because whatever may be the law on that subject, there can be no doubt that the right of redemption sprang into being from the very fact of the sale, and became attached to it as a dissolving condition. C. C. 2045. This being the case, every obstacle, if any existed, to the execution of the mortgage, was removed, and as the evidence of the tender after the seizure was received without objection, we consider that at least from that date the seizure was valid.

The defendant has both orally and by brief urged all his other defenses only in case the tender should be found insufficient, and we are therefore dispensed from passing on the many claimed absolute nullities in the tax sale as well as on the right to seize prior to the making of the tender.

It is therefore ordered, adjudged, and decreed that the judgment of the lower court be and the same is hereby reversed, and, proceeding to render such judgment as should have been rendered by the lower court, it is ordered, adjudged, and decreed that the validity of the tender made by defendant of the amount required to redeem the property sold at tax sale be and the same is hereby recognized, and it is further ordered that upon payment by defendant herein of the amount required to redeem, with five per cent interest thereon from the third day of October, 1874, the injunction be dissolved; the costs up to the third of October, 1874, to be paid by the defendant herein, those subsequent thereto to be borne by the plaintiff.

DISSENTING OPINION.

MANNING, C. J. Tucker, Carter & Co. had obtained judgment in 1873 against R. T. Keene for \$5,500 with interest on a mortgage note, and the mortgage was decreed to be executory. In April, 1874, the mortgaged property was sold for taxes, and was purchased by the plaintiffs, and the deed of the tax collector was executed and recorded. In May the Tucker firm caused execution to issue to enforce their judgment, and the property (a plantation in Carroll parish) was seized. Its sale was arrested by an injunction, in which the plaintiffs claim title to the property under the tax collector's deed, and possession as owners.

The seizing creditors, who with the sheriff are defendants, answer that the plaintiffs' title was inchoate, and could not be complete until six months had elapsed from the date of the tax-deed and the Auditor had executed his confirmatory title, and during this period the owner had the right of redemption, and they as his creditors could exercise his right. They allege a tender made by them to the plaintiffs on behalf of Keene of the sum necessary to redeem the property which was refused, and aver that Keene has fraudulently colluded with one Tibbetts, who was the payee of the note and from whom they obtained it, to defeat their rights. They then attacked the tax sale for alleged informalities. This answer was filed in August 1874.

In fact, no tender or offer to redeem had then been made as alleged, but early in October following, one day before the expiration of six months from the tax sale, an offer to redeem was made by the counsel of the Tucker firm in the name of Keene. The plaintiffs replied to this offer, that if the counsel who made it really represented Keene they would accept it and reconvey the property to him, but they disputed the fact of such representation, whereupon the counsel admitted that he did not represent Keene, but only the mortgage creditors and one

Sprague. In truth, the allegations that Keene was offering through him to redeem the property, and that Keene was fraudulently colluding with Tibbetts to prevent a redemption, and thus cut off the creditors' mortgage, are inconsistent.

It does not appear to me to be a proper construction of the legislative acts concerning tax titles, that the purchaser's deed from the tax collector is inchoate in such sense as to authorize it to be disregarded, and a seizure to be lawfully made of the property as if it belonged to the former owner. Where a purchaser has such title and has judicial possession, the same rule applies in my opinion as in judicial sales. Such purchasers are expressly declared by the law to be the owners of the property, and the sale is to have the same force and effect, and be as binding to all intents and purposes on the former owner as a sale made in any judicial proceeding to enforce the payment of a previous debt. Sess. Acts 1873, p. 180; *Jurey v. Allison*, 30 Annual, 1234. The title from the tax collector is to be held and recognized by the courts as valid in law, and upon its presentation in court it is the duty of the judge to order the sheriff to put the party in possession. *Ibid.* p. 100. The fact that the owner has a given time in which to redeem makes the title precarious in this, that it is liable to be divested by a redemption, but if not redeemed before the Auditor gives the confirmatory title, the right of redemption is lost.

The mortgage creditor has the same right to redeem the property that the owner has. It is true that the law conferring that right in express terms was not passed until after the time when these proceedings were had. Sess. Acts 1875, p. 34. But the right existed independent of that enactment. It would be monstrous that a debtor, by refusing or neglecting to pay the taxes upon his property, should be able to rid it of mortgages through a tax sale, and refusing to redeem it, could debar his creditor who had a special lien upon it from redeeming it also. The debtor might have no interest in redeeming it. The incumbrances might exceed in amount the value of the property. The mortgage creditor has a right to prevent the loss of the security for his debt by re-implementing the purchaser what he has paid out with the additional charges sanctioned by the laws.

There does not appear to be any question made as to the kind of offer made by the creditors, whether it was a tender in the sense of the Code or not. It was made within the time allowed for redemption, and therefore the creditor should not lose the benefit of it, but I think he was not authorized to disregard the tax sale and proceed against the property as if no sale had taken place, and therefore such proceeding was rightfully enjoined. He has the right to avail himself of the tender, made within time, in other proceedings to compel its acceptance, and

make his offer of redemption effectual for the preservation of his mortgage.

In my opinion the judgment of the lower court maintaining the injunction should be affirmed, reserving the defendants' right to proceed in another form to compel the plaintiffs to permit them to redeem the property, if they be legally entitled thereto.

Rehearing refused.

No. 7341.

LOUIS A. GERODIAS VS. T. H. HANDY, SHERIFF, ET AL.

If the petition of appeal contains no prayer for a citation, and the record fails to show that a citation was ordered, issued, or served, the appeal must be dismissed.

A PPEAL from the Third District Court, parish of Orleans. *Monroe, J.*

Simeon Belden for plaintiffs and appellants.

Lacey & Butler for defendants and appellees.

ON MOTION TO DISMISS.

The opinion of the court was delivered by

MANNING, C. J. This appeal was taken by petition. The defendants move to dismiss on the grounds, that the petition contains no prayer for citation, and none was ordered and none served. The motion is sustained by the record, and must prevail.

If the petition of appeal contains no prayer for citation, and none has been issued or served, the appeal must be dismissed. *Bolling v. Anderson*, 10 Annual, 650.

It is the duty of the appellant to see that the necessary steps are taken, which are required by law, to bring up his appeal, and if he fails to cause citation of appeal to issue, he will not be entitled to relief under the Act of 1839, now Rev. Stats. sec. 36. *Walker v. Martolo*, 16 La. 50.

If a party, seeking an appeal by petition, fails to pray for citation, and none is ordered or issued, and the record fails to shew that any has been served, these omissions will be imputed to the appellant, and not to the clerk.

The appeal is dismissed.

Rehearing refused.

In Re Wallace, praying that Award of Arbitrators be made executory.

No. 7218.

IN RE JOHN WALLACE, PRAYING THAT AWARD OF ARBITRATORS BE MADE
EXECUTORY.

In a proceeding to make the award of amicable compounders executory it may be shown that the compounders acted beyond the authority with which they were invested. Any award of theirs not authorized by the terms of the agreement to submit, is void, and may be resisted.

The award of amicable compounders within the scope of their authority is conclusive as to the parties who have agreed to submit, and is not reviewable by the courts.

A PPEAL from the Fifth District Court, parish of Orleans. *Rogers, J.*

E. H. Farrar for plaintiff and appellee.

Kennard, Howe & Prentiss for appellants.

The opinion of the court was delivered by

SPENCER, J. The firm of Wallace & Co. having failed some years ago, obtained under the bankrupt law a composition with their creditors. David Wallace, of the firm, was made liquidator, and after paying off the creditors under the composition there remained a large surplus belonging to the late firm.

Suit was brought in the Fifth District Court by Wilder and Banker of the firm, in which they charged David Wallace with infidelity and mismanagement in liquidating its affairs. Among other things it is charged "that said David Wallace has, in order to increase his apparent capital in the firm of Wallace & Co., entered on the books thereof, as so much capital contributed by him, \$15,000 of stock in the Louisiana Savings Bank and Safe Deposit Company, and \$5000 of stock of the Security Bank of New York, neither of which is of any value, and he illegally claims and will claim that by reason of these credits so made to him he must first be paid the sum of \$20,000, as capital, before their share of profits can be paid to petitioners." They pray for an injunction and for the appointment of a receiver "to liquidate said firm in accordance with law and the agreement of said parties, that a proper accounting and settlement may be had of the said partnership of Wallace & Co.; that they may have judgment against him for such sums as may be found due from him," etc.

Pending this litigation, and before answer thereto, all the members of Wallace & Co. entered into an agreement, wherein it was recited that they were "now engaged in a litigation in the Fifth District Court, with reference to the settlement of the partnership that formerly existed between them under the style of Wallace & Co.," and that "all the parties, in advance of the decision of the court on the questions now submitted to it, are desirous of submitting all their differences to arbitra-

In Re Wallace, praying that Award of Arbitrators be made executory.

tors and amicable compounders." They thereupon agree "to submit all their differences and all questions arising out of the settlement of the partnership of Wallace & Co., and all disputes which may arise between the parties in the course of the arbitration with reference to said partnership affairs, to arbitrators, who shall have the power of amicable compounders, to be appointed as hereinafter designated." They then provide for the appointment of the arbitrators, and for that of two experts who are to assist the arbitrators—declaring that the experts shall report any points of difference to the arbitrators, "who after due proceeding shall finally decide the same, and shall finally state and settle the accounts of said partnership and award to each party whatever may be his right and due." They then agree to enter into bonds each in favor of the other in the sum of \$15,000, conditioned as follows: "That they will abide by the award as made by the amicable compounders, and will pay the sum adjudged against them, within sixty days from the date of the award, the bankruptcy of the parties not excepted, otherwise they and their sureties to be liable for the amount of the award, and the amount of the penalty fixed in the bond."

It is further provided that on the signing of this agreement, and the giving of the said bonds, Banker and Wilder are "to dismiss all proceedings now pending in the Fifth District Court, and this arbitration shall take the place of and be substituted for these proceedings, and shall be the mode of determining the rights between the parties."

The arbitrators rendered their award, declaring in substance that the Wallaces had furnished all the capital of Wallace & Co.; that the surplus remaining after the payment to the creditors, under the composition, must, as far as it went, go first to replace and restore said capital; that Banker and Wilder were entitled to no part of said surplus; but on the contrary largely indebted to David Wallace, liquidator; and they therefore awarded that Wilder pay him \$13,059 15.

The proceeding before us is one to have this award made executory. The only dispute is as to whether the arbitrators transcended the authority given them in the submission—it being conceded on all sides that their award, within the limits of the submission, is final, and not reviewable, as to questions of law or fact, in this or any other court. C. C. 3110; C. P. 459, 460; 4 An. 148; 7 An. 171; 13 An. 37.

We think that a party against whom an award of amicable compounders has been given may, on a proceeding to have it made executory, show as cause against it that the compounders acted beyond and transcended their authority, as given in the submission. Any award thus given outside of the terms and scope of the submission is void, and its execution may be resisted when it is sought to be enforced. Otherwise, the aggrieved party would be without remedy against the

In Re Wallace, praying that Award of Arbitrators be made executory.

most extravagant usurpation of the amicable compounders. C. C. art 3121; C. P. 608-9; 10 An. 642.

We proceed therefore to consider the only question before us. Did the submission authorize the compounders not only to reject Wilder's claims to a share of the said surplus, but also to condemn him to pay in addition a sum of money? We are constrained to answer this question in the affirmative. If we were to adopt the defendants' theory, that the submission only embraced the matters involved in their suit in the Fifth District Court, we have seen, by extracts therefrom, that they themselves put the question of the amount of Wallace's capital at issue, by demanding that certain items credited thereto should be disallowed. As we have seen, Wallace had not filed an answer in that suit at the time of the agreement to arbitrate, and the terms of that agreement were evidently intended to give him the right to set up before the arbitrators every defense and claim that was open to him in that suit. The terms of the agreement are as broad and unqualified as language can make them. Besides, it is manifest that the parties contemplated that the arbitrators were to render awards for money, for they formally agreed to and did give bond, each of them, not only to "abide by the award," but to "pay the sum adjudged against them within sixty days," notwithstanding their bankruptcy. If there was to be in no event a judgment for money against Wilder, why did he give bond and agree to pay such a judgment? We think the compounders acted clearly within the terms of the submission, and that the judgment of the court *a qua* rendering and making their award executory is correct, and it is affirmed at costs of appellant.

Rehearing refused.

Mr. Justice WHITE takes no part in this decision.

No. 7414.

S. W. HAMMOND vs. E. LESSEPS ET AL.

Where the title of an act is "to change the boundary of the parish of St. Bernard," it sufficiently indicates the purpose of the act when that purpose is to take from another parish a part of its territory and add it to the parish of St. Bernard. The title need not set forth the means by which the purpose of the act is to be accomplished.

A PPEAL from the Fifth District Court, parish of Orleans. *Rogers, J. Sambola & Ducros and Chas. E. Schmidt* for Mrs. Lesseps, defendant and appellant.

Richard Shackelford for John Thorn, in rule and appellee.

E. H. Farrar for city of New Orleans, appearing as *amicus curiæ*.

The opinion of the court was delivered by

SPENCER, J. Defendants being sued in the Fifth District Court of

the parish of Orleans, excepted to the jurisdiction thereof on the ground of domicile in the parish of St. Bernard. They live within the territory lying between the "Fishermen's Canal," the United States Barracks, and "Florida Walk," which by act No. 23 of 1875 was taken from the parish of Orleans and added to that of St. Bernard.

Plaintiff claimed and the court held this act to be unconstitutional, in so far as it added said territory to St. Bernard, for the reason that the title of the act did not sufficiently indicate its purpose.

The title of that act is "to change the boundary of the parish of St. Bernard."

The courts in this and other States where similar constitutional provisions exist have always construed them liberally, to avoid the consequences of a too rigid interpretation. Laws enacted by the Legislature are not to be declared void by the courts unless clearly and manifestly unconstitutional. *Cooley's Constitutional Limit.* p. 146 ; 6 A. 608 ; 20 A. 198.

The rule is well stated by Mr. Pomeroy in his notes to the second edition of *Sedgwick on Statutory and Constitutional Law*, p. 520. "The title should fairly indicate the *general subject* of the statute, but need not give an abstract of its contents ; nor need it mention *the means, methods, or instruments by which this general purpose is to be accomplished* ; nor need it express matters which are merely incidental to this subject."

A change in the boundary of St. Bernard necessarily implied a change in the boundaries of one or more contiguous parishes. It was not necessary to set forth in "the title" of the act *the means* by which this purpose, this change, was to be accomplished. We think the general purpose expressed in the title, of changing the boundaries of St. Bernard, is generic, and that the extension of the boundary so as to include the territory in question is germane to that purpose.

The rule is that whatever is germane or incidental to purpose expressed in the title is embraced within it.

This is the spirit of our own adjudications. *N. O. vs. Cazelar*, 27 A. 156 ; *N. O. vs. Bright*, 28 A. 873 ; 28 A. 38.

The fact that the act in question is inconsistent with and repeals by necessary implication act No. 7 of extra session of 1870, extending and fixing the boundaries of the parish of Orleans, is no reason for holding the former unconstitutional. The last expression of legislative will repeals all laws in conflict with it, whether this intent be expressed in the title or body of the act or not expressed in either.

The judgment is reversed, defendants' exception maintained, and plaintiff's suit dismissed as of nonsuit at his costs.

Kirwin et al. vs. Hibernia Insurance Company.

No. 7169.

JOHN KIRWIN ET AL. VS. HIBERNIA INSURANCE COMPANY.

Where in a particular case this court has decided that the Superior District Court of the parish had jurisdiction, the parties to that case can not re-open the question of jurisdiction.

On the trial of the peremptory exception that the plaintiff has not made proper parties to the suit, the allegations of his petition are taken to be true.

A PPEAL from the Third District Court, parish of Orleans. *Monroe, J.*

B. R. Forman for plaintiffs and appellants.

T. Gilmore & Sons for defendants and appellees.

The opinion of the court was delivered by

SPENCER, J. This case was before this court in March, 1876, and is reported in 28 An. 312.

On filing the mandate of this court in the court below (to wit, Third District Court, to which the records of the late Superior District Court had been transferred) the defendant filed as peremptory exceptions:

First—That the court is without jurisdiction to annul and set aside the proceedings and judgments of the Sixth District Court and to annul the sale thereunder, or to perpetuate the injunction.

Second—Proper parties to the suit have not been made.

The judge of the Third District Court sustained these exceptions and dismissed plaintiffs' suit, and they appeal. The sole question before us is as to the correctness of that ruling.

There is no dispute that the Third District Court is the successor of the Superior District Court, and therefore has the same right of jurisdiction in this case as had the latter. The case must therefore be treated just as though still pending in the Superior Court. Now one of the principal questions raised and decided by this court, in 28 An. 312, was as to whether the Superior District Court had jurisdiction to annul what was contended to be decrees and proceedings of the Sixth Court. This court decided that it did have jurisdiction, and remanded the case to be proceeded with therein. We do not wish to be understood as approving that decision, either on that or other points discussed therein. But it has been adjudged that the Superior Court, and therefore its successor, had jurisdiction; and it is not permissible for the same party in the same court to call again in question the same matter. Otherwise, there never could be an end of lawsuits where the lower court differed in opinion with the appellate court, and was inclined to adhere to its own views. The cause could, in such circumstances, be bandied about from the one court to the other any number of times upon the identical same question. *Interest reipublicæ ut sit finis litium.* We can not,

Kirwin et al. vs. Hibernia Insurance Company.

therefore, nor could the lower court, re-open or re-examine that question.

Second—Of course John Kirwin and Kate Kirwin have no authority or mission from the law to represent their minor brothers and sisters or their insane mother, unless they have been appointed tutors to former and curators of the latter; which they do not pretend to have been. But the petition purports to be, not only that of John and Kate Kirwin in their own behalf and in behalf of their minor brothers and sisters and mother, but also that of the mother individually and as tutrix of the said minor children.

It seems to us, therefore, that all necessary parties are before the court, if the petition be taken as true, which for the purposes of this case must be done.

The judgment appealed from is therefore reversed, and this cause remanded to be proceeded with according to law, appellee paying costs of appeal.

No. 7200.

THE STATE VS. E. FRAPPART.

The owner of a restaurant and liquor saloon on board of a vessel plying on navigable waters between this and an adjoining State, and touching at intermediate places in the course of her voyage, can not be compelled by the local authorities of any of those places to pay a license tax for selling spirits, when it appears that he sold liquors only on board the vessel.

APPEAL from the Sixth Judicial District Court, parish of St. Tammany. *Duncan, J.*

Jas. M. Wright, district attorney, for the State.

Ellis & Ellis for defendant and appellant.

The opinion of the court was delivered by

SPENCER, J. The defendant, who is the manager of the restaurant and bar on the "Camelia," a steamboat owned and enrolled in New Orleans and running regularly as a packet between the port of New Orleans and Bay St. Louis in Mississippi, touching at various points on the Lake shore in Louisiana and Mississippi, was indicted, tried, and convicted in the parish of St. Tammany on the charge of keeping a grog and tippling shop, and retailing spirituous liquors without license from the police jury of said parish.

The question is, did the police jury of St. Tammany have the right to demand payment of a license from the defendant, who it is conceded only sold liquor on board of said steamer in the course of her voyage on the lake and navigable streams through which she passed? We

The State vs. Frappart.

think not; for the reason that a boat plying upon navigable waters between different States can not be considered as conducting or doing a business at each and every point where she touches, so as to become subject to taxation at each of said points. Such a proposition would give the local authorities power not only to regulate but to destroy commerce between the States; which power by the constitution belongs exclusively to Congress.

If we recognize over vessels *in transitu* the existence of such power in the local authorities in cases like this we do not see how it could be denied in other cases. After a vessel has completed her voyage, and is at her port of destination it is perhaps competent to enforce on board of her such local police regulations as are necessary to the good order of society. But when on her voyage she is not within the jurisdiction of State tribunals for purposes like this.

The defendant is entitled to his discharge from the fine imposed.

It is therefore ordered that the judgment appealed from be annulled and reversed at costs of appellee.

No. 7081.

MRS. ESTHER CHAPMAN, EXECUTRIX, VS. S. O. NELSON ET AL.

In a suit to revive a judgment there are but two necessary and proper parties, viz., the judgment creditor or his legal representative and the judgment debtor or his legal representative. Third persons who hold property affected by the legal mortgage resulting from the inscription of the judgment sought to be revived, are not necessary or proper parties to the suit to revive.

In a suit to revive a judgment against a debtor who has made a surrender in bankruptcy, under the bankrupt law of the United States, the assignee of the bankrupt is not a necessary party, and can not therefore be compelled to appear as a defendant in the suit.

A suit to revive a final judgment which was rendered by the Third District Court for the parish of Orleans in March, 1867, can not be brought in the Fourth District Court of that parish. The transfer of the suit in which the original judgment was rendered, first to the Seventh, and afterward to the Fourth District Court of said parish, under the acts of the Legislature in 1868 and 1872, did not give to either of those courts jurisdiction of the suit to revive.

A PPEAL from the Fourth District Court, parish of Orleans. *Houston, J.*

Geo. L. Bright and Barrow & Pope for plaintiff and appellee.

Armand Pitot and B. F. Jonas for defendant and appellant.

The opinion of the court was delivered by

MARR, J. This suit was brought on the sixteenth of March, 1877, in the Fourth District Court for the parish of Orleans to revive a judg-

Chapman, Executrix, vs. Nelson et al.

ment of the Third District Court of New Orleans against Stephen O. Nelson, signed on the twenty-ninth of March, 1867.

The petition charges substantially: That by act No. 46, of 1868, the records of the Third District Court, except appeals from justices, were transferred to the Seventh District Court; that by act No. 2, of 1872, all suits and proceedings then depending in the Seventh District Court were transferred to the Fourth District Court, and among them the suit against Nelson; that the judgment against Nelson was recorded in the parish of St. Mary on the first of April, 1867, and created a judicial mortgage on all the immovable property belonging to him in that parish, and specially on the lands described in the petition; that this property is now owned by the Citizens' Bank; that Nelson, now a non-resident, was adjudicated a bankrupt, and E. E. Norton was appointed assignee; and that plaintiff desires to have the judgment revived.

The prayer is that Nelson, through a curator *ad hoc*, the Citizens' Bank and Norton be cited to answer the petition; and that contradictorily with them, the judgment be revived.

The bank plead to the jurisdiction without stating the grounds; it also plead the prescription of two years under the bankrupt law, and of ten years under the State law; it set up the discharge of Nelson in bankruptcy, as a perpetual bar; and plead that the property having been sold according to law, could no longer be made subject to the judgment in favor of plaintiff; that therefore the bank could not be made a party to this suit, as owner of the land; and that this proceeding, if authorized by law, could be maintained only against the assignee.

Norton did not appear, and default was entered against him; and Nelson answered, pleading his discharge in bar of plaintiff's claim.

The case was tried on these issues. The district judge held that Nelson, being a discharged bankrupt, could not be cited; that Norton was the representative of Nelson or of his estate; and that the bank was his representative, *quoad* the property described in the petition. He accordingly rendered judgment dismissing the demand as against Nelson, and maintaining it as against the Citizens' Bank and Norton, the judgment, so far as it relates to the bank, to have effect only against the property described in the petition, and not to have effect or be enforced as a personal judgment against the bank; and, so far as it relates to Norton, to have effect only against the estate in bankruptcy, and against Norton as assignee, and not personally.

The Citizens' Bank and Mrs. Chapman appealed, the latter complaining of so much of the judgment as dismissed plaintiff's demand as against Nelson.

The act of 1853, p. 250, re-enacted in the Revised Statutes, sec. 2813, and embodied in the R. C. C. as article 3547, after declaring that all

judgments for money shall be prescribed by the lapse of ten years after they are rendered, provides, however, "that any party interested in any judgment may have the same revived at any time before it is prescribed, by having a citation issued according to law, to the defendant or his representative, from the court which rendered the judgment, unless the defendant or his representative show good cause why the judgment should not be revived; and if such defendant be absent and not represented, the court may appoint a curator *ad hoc* to represent him in the proceedings, upon which curator *ad hoc* the citation shall be served."

This statute evidently contemplates but two parties to the proceeding: the judgment creditor, the plaintiff, or such other person as may be interested in the judgment; and the judgment debtor, the defendant in the original suit. The word "representative" simply means the agent or attorney in fact, if the defendant be living, or the curator or executor, or administrator, or heir, as the case may be, if he be dead; the person having authority and capacity by the appointment of the defendant, if he be living, or by judicial appointment, or by the effect of the law, if he be dead, to be cited and to stand in judgment in his room and stead. If he be living, absent and not represented, he must be cited through the curator *ad hoc* appointed by the court for that purpose.

The judicial mortgage is the effect which the law gives to a final judgment when it has been recorded in the manner prescribed by law. The right to have a judgment revived is merely the means provided by law for keeping the judgment alive, which might otherwise be prescribed, barred, and extinguished by the lapse of time; and this right is wholly independent of the right of mortgage which results from the inscription of the judgment.

The right to have a judgment revived, and the effect which the revival may have as against third persons, are two very different things. It will be time enough for third persons, that is persons who were not parties to the judgment, to assert their rights, and to controvert the validity and effect of the revival, when the revived judgment is set up and sought to be enforced to their prejudice.

All that is said in the petition about the legal mortgage which plaintiff claims, and all that is said about the rights of the Citizens' Bank, must be left entirely out of view. The naked question is, has the plaintiff the right to have the judgment revived in this proceeding; and that question is to be determined solely between the plaintiff, the judgment creditor, or his legal representative, and the judgment debtor, the defendant, or his legal representative. The Citizens' Bank was, in no sense, the representative of the defendant Nelson; and it was not capable of standing in judgment in his room and stead. The bank should not have been cited; and it was not legally a party to the suit.

By the surrender in bankruptcy the bankrupt divests himself of the title, ownership, and possession of all that was his not exempt by law; and the legal title vests in the assignee chosen by the creditors, or appointed by the court, to administer the estate in bankruptcy for the benefit of the creditors. The assignee is the representative of the creditors, so far as the estate in bankruptcy is concerned; but he is not the representative of the bankrupt, for the very good reason that the bankrupt has no rights or interests to be protected or represented. By the surrender he abandons his rights, credits, effects, property, to his creditors; and the law discharges him from liability for debts contracted prior to the date of the surrender, and provable against his estate in bankruptcy. It is no concern of his what becomes of the property afterwards: he would not be permitted to interfere in any manner with the disposition of it; and the creditors, whose debts are provable in bankruptcy, must and will have their respective rights, claims, and priorities determined and settled in the bankrupt court, without regard to him.

It is not necessary to make the assignee a party to a pending suit, whether brought by the bankrupt or against him. The person against whom the bankrupt may have brought suit could protect himself against a recovery by pleading the bankruptcy, and consequent divestiture of the rights of the bankrupt; and if he should neglect thus to protect himself, a recovery by the bankrupt and payment to him would be no obstacle to the assertion and enforcement of the same right by the assignee. If a suit should be pending or be brought against the bankrupt for a cause of action accruing before the bankruptcy, and provable in bankruptcy, the law affords the bankrupt ample means of protecting himself by pleading the bankruptcy and demanding a stay of proceedings; and by afterwards pleading and exhibiting his discharge as a complete and perpetual bar.

The bankrupt act enables the assignee to intervene in pending suits, either as plaintiff or defendant, if, in his judgment, it should be necessary for the protection of the rights and interests of the creditors; but he can not be compelled to assert, in the State courts, any of the rights of the bankrupt which vested in him by the assignment, nor any of the rights of the creditors against the bankrupt or against the estate, since he can compel every person asserting claims against the bankrupt or against the property surrendered to assert and maintain their rights contradictorily with him, in the bankrupt court. See *Serra vs. Hoffman*, 29 An. 18 to 23, where this subject is fully discussed.

The State courts are powerless to render any judgment against the assignee where he does not voluntarily submit to the jurisdiction, touching the payment of any debt due by the bankrupt, since the law

requires all creditors having claims against the estate to prove them in the bankrupt court.

The assignee is not the representative of the judgment debtor, the defendant, in the sense of the act of 1853; and the bankrupt can not be brought into court for any purpose by citing the assignee.

The judgment against Nelson was a debt provable against his estate in bankruptcy; and we have serious doubts as to the right to give it any new or additional effect by any form of judicial proceeding against the bankrupt, instituted after his discharge. We incline to the opinion that when the judgment debtor is cited to show cause why a judgment rendered against him prior to his bankruptcy, and provable against his estate, should not be revived, he has the right to plead and exhibit his discharge as a complete and perpetual bar to the proceeding.

By the constitution of 1868, art. 83, seven district courts were established for the parish of Orleans. Changes were made in the jurisdiction of the courts; and that of the Second District Court was restricted to matters of probate, and that of the Third District Court to appeals from justices: and art. 151 required the General Assembly to "provide for the removal of causes now pending in the courts of this State to courts created by or under this constitution."

The first act on this subject is No. 7, of 1868, p. 7, entitled "An act to transfer all causes now pending before the courts of the parish of Orleans, under the constitution of 1864, to the courts created by the constitution of 1868." The first section of this act declares that "the records, dockets, books, and papers in any of the district courts of the parish of Orleans shall be removed to the several courts," designated by the corresponding numbers created by the constitution of 1868: "those in the Third District Court * * * to the Seventh District Court * * * except the records of appeals from justices of the peace, which last mentioned records are hereby transferred to the Third District Court."

The second section of this act provides that "the courts to which any suits now pending may be transferred, under this act, shall entertain and exercise jurisdiction over the same, and the cases so transferred shall be proceeded with in the new courts in all respects as if no change had been made."

The third section requires the "records, dockets, indexes, and all other papers on file in the district courts of the parish of Orleans," to be delivered to the clerks of the new courts to which they have been removed by the first section; and the original records of suits not finally disposed of in accordance with this act in the Third District Court * * * shall be transferred to the Seventh District Court * * * except the records of appeals from justices."

This act was amended by act No. 46, same session, p. 54, entitled "An act to amend an act entitled," giving the title of act No. 7. This act consists of a single section, and it differs from the first section of the original act only in that it provides that all succession and probate causes "undisposed of and now pending before the district courts of New Orleans shall be removed to the new Second District Court, and that court shall have and maintain jurisdiction over the same to the full extent as though the said case had originally been instituted in said Second District Court."

Act No. 2 of the called session of 1872, p. 38 of the acts of 1873, abolished the Seventh District Court; and section 8 of this act provided that "all suits and proceedings now depending in said Seventh District Court * * * are hereby transferred to the Fourth District Court * * * and the said * * * court is hereby vested with jurisdiction to hear and determine such suits or proceedings as if the same had been originally brought in said * * * court; and the said suits or proceedings are declared to be pending in said * * * court from * * the passage of this act.

"The records of all suits or proceedings *heretofore brought in said Seventh Court*, whether determined or not * * * are hereby transferred to said Fourth * * Court; and all proceedings so transferred shall be proceeded with in said Fourth * * Court, and be tried and determined, and process and judgment issued and executed therein by said * * court, in the same manner as if the same had been commenced originally in said * * court."

Careful attention to the phraseology of acts 7 and 46 of 1868 will show that, with one exception, the word "removed" is used only with respect to the records, dockets, books, indexes, and papers; and that where jurisdiction is to be exercised, the word "transferred" is used; and that this word is used only with respect to suits "now pending" in accordance with the limitation in art. 151 of the constitution, and the titles of the two acts. The exception is in the latter part of act No. 46, where the word "removed" is used with respect to "succession and probate causes undisposed of and now pending." The Legislature kept up the distinction, however, and did not consider the word "removed" as having reference to or as conferring jurisdiction; because the language immediately following that requiring such causes to be "removed" is, that the new court into which they are removed "shall have and maintain jurisdiction over the same, to the full extent as though the said case had originally been instituted in said court."

It is clear, therefore, that neither by art. 151 of the constitution, nor by either of the acts 7 and 46 did the Seventh District Court acquire jurisdiction with respect to any other than suits then pending in the

Third District Court. It became merely the custodian of the records, dockets, books, indexes, and papers removed to it; and jurisdiction in all suits pending, not finally disposed of, which were transferred.

The first clause of section 8 of the act of 1872 relates to pending causes; and there might well be pending in the Seventh Court two classes of suits, those which were pending in the Third District Court at the time of the transfer, which had not been disposed of finally by judgment of the Seventh Court, and those which had been brought in the Seventh Court, and had not been tried and determined.

The second clause applies to all suits and proceedings, whether determined or not; but it is limited expressly to suits or proceedings "*heretofore brought in said Seventh District Court.*" It is not possible to give this language any construction which would bring within its terms a suit which was finally disposed of by judgment in the Third District Court: which was not pending in the sense of art. 151 of the constitution, nor in the sense of acts 7 and 46 of 1868; and which never was pending in the Seventh District Court. The Fourth District Court did not acquire any jurisdiction with respect to this suit; and it may be seriously questioned whether it could have enforced that judgment by execution.

In *LaChambre vs. Cole*, 30 An. 961, we had occasion to consider a similar question. A judgment had been obtained in the district court in a probate proceeding upon the account of a tutor. At the time this judgment was rendered there were no probate courts; and the district courts exercised all the probate jurisdiction of which they were divested by the constitution of 1868. The owner of that judgment brought suit to revive it in the district court in 1877, when the court could no longer have entertained jurisdiction of the original cause. It was urged that the citation should have been issued from the parish court vested with probate jurisdiction by the constitution of 1868; but we considered the language of the act of 1853 as determinative; and we decided that "the court which has jurisdiction of suits for revival of judgments is distinctly pointed out in the act of 1853, which provided for their revival. The citation must issue from and the suit must necessarily be addressed to the 'court which rendered the judgment.'"

The law has conferred no power on the Fourth District Court to entertain the demand of plaintiff; and the whole proceeding in that court was *coram non jndice* and void. We are not required now to decide whether the Third District Court would have had jurisdiction to issue the citation and to revive the judgment; but if it had not there is a *casus omissus* with respect to the judgments rendered in that court prior to the adoption of the constitution of 1868, which the legislative department of the government alone could have supplied.

The judgment appealed from, except so much of it as dismissed the demand of plaintiff as against the defendant Nelson, is, therefore, annulled, avoided, and reversed; and it is now ordered, adjudged, and decreed that the demand of plaintiff be rejected, and that her petition and suit be dismissed, she paying the costs in the district court and in this court.

Rehearing refused.

No. 7347.

JAS. L. PARMER VS. JAS. G. MANGHAM ET AL.

A debtor may validly convey his immovable property to his creditor, in the form of a sale, in order to secure the creditor, when the value of the property is not in excess of the debt due, reserving to himself the right to redeem within a certain period. The continued possession of the property by the debtor in such a case, does not make the transaction a fraudulent simulation, or necessarily void. In such a transaction the conveyance, although in the form of a sale, does not vest the ownership of the property in the creditor, but may give him a right to be paid by priority out of its proceeds.

A PPEAL from the Seventeenth Judicial District Court, parish of Red River. *Pierson, J.*

Jos. H. Pierson for plaintiff and appellee.

L. B. Watkins for defendants and appellants.

The opinion of the court was delivered by

MARR, J. In September, 1873, James G. Mangham, and several others, were indicted and prosecuted for murder, charged to have been committed in 1867. Mangham and three others were arrested, and they gave their note, *in solido*, for \$2000 in favor of the several attorneys employed to defend them. The prosecution seems to have been without foundation, so far at least, as Mangham was concerned; and he and his co-defendants were acquitted.

During the trial Mangham was sick; and the judge permitted him to be kept, under guard, at the house of his friend, Thomas W. Abney, who took care of him, and hospitably entertained him and his guard.

The prosecution caused Mangham great distress, and pecuniary embarrassment; and, in October, 1873, he made a conveyance of his property to his friend Abney. This title was not recorded: Abney made no claim to the property; and the conveyance was a mere simulation, designed to protect the property against the apprehended pursuit of creditors.

On the 18th of November, 1873, Lisso & Bro., to whom Mangham was indebted for advances and supplies, brought suit against him, and caused to be attached his entire property; and, at the same time, the

attorneys, holders of the note for \$2000, brought suit, and obtained an attachment, which was levied on the same property.

Mangham considered himself a ruined man. In his distress he called upon his friend Abney for assistance. The first idea was to have the property attached released on bond; but this would have afforded him only temporary relief, as the amount of the two debts exceeded the realizable value of the property. It was finally agreed that Abney & Love, a commercial firm, composed of Thomas W. Abney and Leander E. Love, should assume and pay the debts, and that Mangham should convey to them the entire property, consisting of a plantation, stock, crop, implements and utensils, and a house and lot in Springville.

This arrangement was under discussion for four or five days. At length the attorneys reduced their claim to \$1042, which appears to have been paid in cash, as were the clerk's and sheriff's fees, amounting to \$90; and Lisso & Bro. accepted the notes of Abney & Love, one for \$943 75, payable in November, 1874, the other for \$443 74, payable in November, 1875. In consequence of these payments and assumptions, and of other advances to, and indebtedness of Mangham to Abney & Love, he conveyed to them, by notarial act of November 24, 1873, for the stated price of \$2690, the entire property attached; and they gave him a counter letter, stipulating that on payment of this sum, and of all liabilities that Mangham might contract with them, they would reconvey the property to him. After this counter letter had been copied into the letter-book of Abney & Love, these words were added, at the suggestion of Love: "If the above is paid in two years from this date."

The partnership of Abney & Love was dissolved; and, in June, 1875, Abney sold and conveyed to Mrs. M. E. Love, wife of L. E. Love, his half of all the property and assets of Abney & Love, including the property conveyed to them by Mangham.

In June, 1875, L. E. Love and J. H. Sheen formed a partnership; and Mrs. Love conveyed to Sheen all the property and effects conveyed to her by Abney. In June, 1877, the firm of Love & Sheen was dissolved; and Love conveyed to Sheen his entire interest in all the property and assets. Immediately after this Sheen and Julius Lisso formed a partnership, under the style of Lisso & Sheen; and, by the written articles of partnership, Sheen brought into the new firm all the property and assets of the preceding partnership, including the Mangham plantation.

At the date of the conveyance to Abney & Love by Mangham they had an account current with him, and they charged the amounts assumed by them as cash. The balance against Mangham, on the 19th of December, 1873, was \$2607 97, and on the 4th of January, 1875, it was \$1860 90. Love & Sheen, the successors of Abney & Love, continued

Parmer vs. Mangham et al.

the account and dealing with Mangham ; and the balances against him were, 1 March, 1876, \$1369 63 ; 11 January, 1877, \$1317 78. The balance transferred to their successors, Lisso & Sheen, on the 8th June, 1877, was \$1412 06 ; and the account closed 15 November, 1877, with balance in favor of Lisso & Sheen, \$1547 41.

On the 1 March, 1876, Love & Sheen sold and conveyed, by notarial act, to Thomas Minter, forty acres of the Mangham land, for \$232, payable in two equal installments, represented by two notes due 1 January, 1877, and 1878, respectively, secured by mortgage on the property. Mangham negotiated this sale. The notes were drawn to the order of Love & Sheen ; and the mortgage contained the pact *de non alienando* and was duly recorded.

In February, 1877, Love & Sheen sold and conveyed to James Lee, by notarial act, 200 acres of the Mangham land, for \$1200, payable in three equal installments, represented by three promissory notes, to the order of Love & Sheen, due, respectively, 1 January, 1878, 1879, 1880, secured by mortgage duly recorded. This sale was also negotiated in part by Mangham, and he was a witness to the notarial title.

In September, 1876, Rawlins & Murrell recovered a judgment against D. H. Hayes and James G. Mangham, *in solido*, for \$576 76, with interest from 1872 ; and on the 1 March, 1876, they brought suit against Mangham, Abney, Love & Sheen, and Mrs. Love to have set aside, as fraudulent, the conveyance by Mangham to Abney & Love, and to subject the property to the payment of their judgment.

After this suit was brought, and for the purpose of showing possession in Love & Sheen, as Mangham testified, a contract of lease was entered into, by which they let the plantation to Mangham, except the 240 acres sold to Lee and to Minter, and Mangham gave them his note for the rent, \$500, payable November 15, 1877. The lease and note were actually executed after the first of March, but they were antedated first January to prove what was false, that they were anterior to the Rawlins & Murrell suit.

Lisso & Sheen, successors of Love & Sheen, settled the Rawlins & Murrell suit by paying the debt, less about \$100. In September, 1877, they delivered the rent note, with the word "settled" written across the face, to J. A. Mangham, son of J. G. Mangham, on his written assumption of the debt ; and on the fifteenth of November they brought suit against the Manghams, father and son, to recover the \$500 for rent. They also obtained a writ of provisional seizure, which was executed at the same time that citation was served on James G. Mangham, November 17, at his domicile.

Mangham took measures promptly to meet this attack. Beginning on the day the process was served, he went about the country in com-

pany with his son-in-law James L. Parmer, and obtained from his creditors transfers of their claims to Parmer. On the twenty-third November Parmer brought suit against him; and on the same day Mangham confessed judgment in his favor for \$2433, with interest.

The suit was based on a promissory note to the order of Parmer for \$876 52, dated January 1, 1877, which is no indication of its real date, bearing eight per cent interest: a claim of Mrs. Parmer for \$320 for services rendered to her father, James G. Mangham, as housekeeper and for sewing, cooking, and labor performed, at his instance, from March 1, 1875, probably the date of her marriage to Parmer, to November, 1877: a note in favor of Sarah A. Mangham, another daughter, for \$113 40, transferred to Parmer November 19, 1877; and sundry other debts, most of them represented by promissory notes, transferred to Parmer, from the seventeenth to twenty-seventh November, inclusive. The proof is that Mangham procured the transfers of most of these debts: that Parmer neither paid nor promised to pay any thing for them; and that there was, in some instances, a promise by Parmer or Mangham that the transferrers should have whatever Parmer might realize on them.

Armed with this judgment by confession Parmer brought this suit, on the seventeenth December, 1877, against his father-in-law, Mangham, Abney, Love, Mrs. Love, Lisso & Sheen, to have declared a fraudulent simulation the conveyance to Abney & Love; and to subject the property to the payment of the judgment. It would have been a cruel assault by Parmer upon the good name and reputation of his wife's father, and upon the peace and happiness of the entire family, if Mangham himself had not been an active aider and abetter in the whole proceeding, and "consenting thereto."

Without attempting a detailed statement of the pleadings and evidence, which are voluminous, we shall continue the narrative form with special reference to the material facts and issues.

It was excepted that the entire conveyance was attacked, and that Lee and Minter, to whom Love & Sheen conveyed 240 acres of the land, were not made parties. There may be some question as to the right of a creditor to attack, for simulation, without making all the persons holding titles under the alleged simulated title parties to the suit. One inevitable consequence of this omission is that the titles of Lee and Minter and their obligations, as makers of promissory notes for the price, and as mortgagors, can not be in any manner impaired by any judgment that may be rendered in the suit.

It was alleged by defendants that the suit of Parmer against Mangham was a fraudulent collusion between Parmer and Mangham. The

proof goes far toward establishing this defense, as a review of it will show.

In 1873, Parmer came to Mangham's without means or visible property, and was employed by Mangham as a laborer on the farm, his wages being \$150 for the year. It seems he continued in this service in 1874, 1875, 1876, at no stipulated wages; and in 1875 he married Mangham's daughter. His wages for 1873 were paid; and he says Mangham agreed to let him have part of the land for his services. In 1877 he seems to have cultivated a portion of the land on his own account. At any rate, there was no attempt to prove any consideration for the note except the wages for his services in 1874, 1875, 1876, which Mangham estimated at \$250 a year. This would have been \$750 for the three years. The note representing this is headed with the figures \$876 52. The sum written in the body of the note is "eight hundred and fifty-two dollars." The confession and the judgment are for the amount shown by the figures, not that written in the body of the note.

Before his marriage Parmer lived with Mangham, and after his marriage he and his wife continued to reside with Mangham, all as one family. His wife's claim for \$320 for wages as cook and servant in her father's family is unusual and extraordinary: and it would require for its support a positive contract.

One of the transferred notes sued on is in favor of Dr. Davidson for \$140, dated November 19, transferred same day. Dr. Davidson says Mangham, in company with Parmer, came to his house one night, and soon after they were seated, Mangham made known his business. He said: "Doctor, I am owing you an account which I have not been and am not able to pay; but I wish to settle it by note." "I told him very well, and went to get my book in which I kept my accounts. While I was making up the account, before the note was written, Mangham said to me that he wished I would make it out as large as I could conveniently. I told him I could make it out only as it was on my books, that I would not charge any more nor any less. After I made out the account I drew the note for the amount, and Mangham signed it. After he signed it he told me he wanted me to transfer it to his son-in-law Parmer, that he was about to be defrauded out of his property or something to that effect; and that the note would do him no good unless I transferred it to Parmer. I hesitated for some time before I would do so, because the request was a novel one; but, after reflecting about it, I considered the debt a worthless or extremely doubtful one; I complied with his request, and wrote and signed the transfer. There was no consideration for this transfer, and it was made by me to Parmer at the request of Mangham. I did not even expect ever to receive any thing for the account. I had very little if any thing to say to Parmer about

the matter. I have no recollection of any thing that was said by Parmer. Mangham is the one at whose instance the note was given and the transfer indorsed. * * * I remember that he (Mangham) said that he wanted all the debts against him transferred to Parmer, that he would through Parmer in some way secure his homestead, or get his land, or secure it, or some thing to that effect."

Another of the transferred claims is a note, favor of Kirk, for \$155 70 for labor for the year 1877, dated eighteenth November. Kirk says he does not think Mangham owed him any thing but for the wages of 1877, fixed at \$125. In the latter part of the year Mangham came to him and said he wanted him to sign a note. He touched the pen, and Mangham made his mark. He is illiterate, can not read or write. What he signed was the transfer, written at the same time as the note. "Mr. Parmer never said any thing to me about the note when I signed; he has never said any thing to me about it since that time. Mr. Mangham owed me just \$125 for work. It has not been paid." This note is evidently in excess of the amount due Kirk by \$30 70.

Another claim is a note in favor of Boze, dated August 17, 1877, for \$120 for labor on the farm. Boze says he worked for Mangham just six months; and when he left he owed Mangham a small account, say \$15 to \$20. No rate of wages had been agreed upon. In November Mangham sent to ask him to meet him at East Point. When he got there Mangham told him he wanted to give him a note for his work, "and that he wanted me to transfer it to his son-in-law Parmer, and that he would do right by me when I came out to see him and have a settlement. At the rate of the real value of my work Mangham owed me at the date of that note only about \$70 or \$75.

"Parmer was present at the conversation between me and Mr. Mangham at the time the note was given and the transfer written, but had nothing to say to me about it that I remember. Mr. Parmer never paid me any thing, nor even promised to pay me any thing for the transfer of the note."

Parmer says he had a private conversation with Boze, "away from the presence of any other person, in regard to the transfer;" and it was then agreed that he was to pay Boze whatever part of it could be realized. "He said nothing to me about the note being for wages that Mangham owed him. I certainly did not know such to be the case." Now, Parmer lived in Mangham's house, and worked on the farm from 1873 to 1877 inclusive; and if Boze really worked there on wages in 1877, Parmer must have known it. Besides, the note expresses on its face that it is for labor performed on the farm. If any thing was due Boze, which the testimony makes somewhat doubtful, the note is in excess of the true amount by from \$45 to \$50; and it is falsely dated

August 17, when it was actually made in November. If Mangham and Parmer could thus get up exaggerated claims for the purpose of assailing the title, and defeating the rights of his benefactors and friends, what liberties would they not take with dates and amounts, when arranging Mangham's indebtedness to the members of his own family for the same purpose, and preparatory to the confession of judgment?

Parmer could not have hoped to succeed in this case without proving that his father-in-law had practiced fraud to the prejudice of his creditors; and he charges in his petition that the sale to Abney & Love was "a cover, and fraudulent and fictitious simulation, and was made and entered into to deceive and defraud the creditors of said J. G. Mangham, and to prevent them from exercising their rights over the property of said J. G. Mangham, and likewise for the purpose of defrauding his future creditors." The proof satisfies us that this suit is the result of a fraudulent collusion between Mangham and Parmer; that the whole proceeding is violative of public decency, of common honesty, of truth and justice; and that a proper disposition of the case would be to turn the plaintiff out of court on his own showing.

It is manifest that there was no fraud on the part of Abney & Love in taking the conveyance of Mangham's property by public notarial recorded title; and in giving him the counter letter, stipulating the right of redemption. The consideration was real and meritorious. Mangham's property was attached for debts which, with costs and interest, would have exceeded the amount for which it could have been sold at a forced sale. There were 640 acres in the plantation; and Mangham says the land was worth about six dollars an acre. They assisted him in his hour of need and sore distress; and they intended to hold the title merely as security for their just demands. They did not want the land; and Mangham says, notwithstanding the term of two years granted in the counter letter, that Abney & Love told him he could have ten years within which to redeem.

The form of security taken in this case, was precisely that which Abney & Love were in the habit of taking in other cases where they made advances. There is nothing illegal or immoral in this. *Wolf vs. Wolf*, 12 An. 529. It is hazardous to the creditor, because of the continued possession of the debtor; but it is not a fraudulent simulation, nor is it necessarily void. If Abney & Love had taken a mortgage instead of a conveyance, upon the same consideration, there could have been no question as to its validity. Practically, what difference can it make to other creditors, whether the security given to a real creditor is in the form of a mortgage or a sale? In neither case would the secured creditor be allowed to claim the property in absolute ownership; and, if the value of the property mortgaged or apparently sold is in excess of

the debt intended to be secured by it, other creditors can enforce their demands to the extent of the surplus, by judgment, execution, and sale.

In *Williams vs. schooner St. Stephens*, 1 N. S. 418, a vessel was seized for supplies furnished. Stebbins intervened, and claimed the vessel as his property, he having purchased it in New York, where it went after the supplies had been furnished. The district court decreed the vessel to be his property.

The proof was that the vendor, finding himself in want of money, obtained seven hundred dollars from Stebbins, and conveyed the schooner to him as security, under an agreement that it was to be reconveyed to him on payment of the amount. This court held, Judge Martin delivering the opinion, that the contract, though in form a sale, in reality was a pledge. The judgment of the district court was reversed; and it was decreed that the schooner be sold, and, after paying Stebbins, that the balance be applied to the debts due the seizing creditors. See also opinion delivered by Judge Porter, refusing a rehearing in this case, 2 N. S. p. 22, in which the court held that the sale was merely a security, and that as such it was valid; and that the apparent vendor was still the owner, and his creditors had still the right to seize, subject to the right of the secured creditor to be paid out of the proceeds.

In *Zacharie vs. Buckman* a debtor sold his property to one of his creditors for the purpose of protecting it against other creditors. It appeared, by a counter letter, that the creditor, Woodman, agreed with the debtor, Tanner, to reconvey the property on Tanner's paying him a certain sum, at a certain date, and delivering up a note of Woodman for the balance of the price. A few days after the note was given up; but the money was not paid. The suit was to annul the sale for fraud and simulation. The judgment of the district court, which was affirmed, annulled the sale, but reserved for the heirs of Woodman the amount due, \$1200, out of the proceeds of the sale. 10 La. 308.

In *Collins vs. Pellerin*, 5 An. 99, it was held that a sale of movables, with the right of redemption stipulated in a counter letter, where the vendor remains in possession, is merely a security, and does not vest a title of ownership in the vendee. See to the same effect *Wolf vs. Wolf*, 12 An. 529.

In *Gleises vs. McHatton*, 14 An. 560, it was held that where the sale is absolute, but it was really intended as security, the vendee can not arrest by injunction the seizure and sale of the property; and that he should proceed by way of opposition, to claim a priority on the proceeds.

The books are full of cases in which sales have been declared simulated, and in which creditors have been allowed to seize property con-

vayed by simulated title, as if no such title had been made; but we know of no case in which a sale has been treated and avoided as an absolute nullity where there was a sufficient consideration; and the intention of the parties was merely to secure a just debt. Such a sale does not protect the property from seizure and sale, at the suit of creditors; but it may give the secured creditor a right to be paid by priority out of the proceeds. To set aside a contract on the ground of simulation, it must be not only simulated, but it must also be fraudulent and prejudicial to the complaining creditor.

In one sense a writing or contract which is not, in reality, what it purports to be, is a simulation; but if the purpose of the contract be lawful, and the consideration be sufficient to support it, though the design be not actually that which its terms import, it is not a fraudulent simulation, nor is it necessarily without legal effect.

The fact that Mangham remained in possession would be a badge of fraud or simulation; but it has no such significance when the real design of the parties is proven to have been, not to vest the ownership, but to secure a just debt. During the years 1875, 1876, 1877, Mangham wrote frequently to Love & Sheen; and whenever he had occasion to refer to the property, or to his relations to it, he called the land "your land," and himself "your agent." If he possessed for them, and as their agent, the apparent contract of sale would have been, in reality, in the nature of a pledge. His letters go far toward showing such possession and agency; but he had the courage to testify, as a witness in this case, in behalf of his son-in-law, that these letters were written to support the original simulation, and to give a show of reality to what was merely fictitious; and that one of them was antedated, as were the lease and note for the rent, for the same purpose.

Abney & Love adopted a novel mode of defrauding the creditors of Mangham. When his property had been seized, they released it by satisfying and paying the seizing creditors; and when they took from him a conveyance of the same property for their security, the certificate of the recorder of mortgages shows that it was free of incumbrance. When Rawlins & Murrell attacked the title, not for simulation, but for fraud, Lisso & Sheen paid the debt. The several firms, from Abney & Love down to and including Lisso & Sheen, not only saved the property from forced sale, but extended credit to Mangham for necessary supplies for the cultivation of the plantation, and for the maintenance of his family. We can not declare the contract by which the just demands of these creditors were to be secured simulated and void merely because it was not intended to convey ownership as it purports, but to secure a debt; and we think its legitimate effect is to entitle the secured creditors to be paid by priority out of the proceeds whenever a sale shall be made at the

Parmer vs. Mangham et al.

instance of other creditors. The certificate of the parish recorder shows that this conveyance was recorded in the book of mortgages, in his office. The real nature of the contract is disclosed by the counter letter; and we see no reason why the mere form should deprive it of the effect which it was designed to have.

If Parmer had actually seized the property under execution, and the issues presented in this case had been made on the injunction or opposition of Lisso & Sheen, we might possibly have ordered a sale, reserving to Lisso & Sheen, out of the proceeds, the amount due them. But Parmer did not seize the property; and his judgment is so manifestly exaggerated and fraudulent that we should hesitate to recognize it as valid against any other person than Mangham alone. We entertain no doubt of the right of Lisso & Sheen to proceed to enforce the mortgages given by Lee and Minter, if they hold the notes given for the price; and it is clear that they would be bound to credit the amount realized to the balance due by Mangham. On the whole our conclusion is that the plaintiff is not entitled to have the conveyance to Abney & Love declared to be void as a fraudulent simulation; but that any judgment creditor of Mangham has a right to have the property seized and sold under execution, subject to the right of Lisso & Sheen to be paid the balance actually due them, as it might be established contradictorily, on opposition or otherwise.

The judgment of the district court declared the conveyance to Abney & Love by Mangham unreal, simulated, and without effect, reserving the rights of defendants as creditors of Mangham. This judgment is erroneous.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed; that the suit and demand of plaintiff be rejected, without prejudice to his rights as a creditor of James G. Mangham, whatever they may be; and without prejudice to the rights of defendants, or any of them, whatever they may be; and that the plaintiff, appellee, pay the costs in both courts.

No. 7380.

THOMAS J. PIRTLE VS. WARREN PRICE ET AL.

On the trial of a rule to dissolve a sequestration the allegation of the sequestrator, in his affidavit, that the goods sequestered belonged to the succession of which he was curator, will be assumed as true, although it may be without foundation in fact.

Property purchased with the identical money stolen by the purchaser from a succession belongs to the succession, and may be sequestered in the hands and recovered from the possession of the purchaser by the curator of the succession.

A PPEAL from the Ninth Judicial District Court, parish of Grant. Blackman, J.

A. Casabat and R. P. Hunter for plaintiff and appellant.

H. L. Daigre and James G. White for defendants and appellees.

The opinion of the court was delivered by

DEBLANC, J. In this case, and for the purposes of this trial, we must consider as true the allegations of the petition which we have before us. What do they disclose? That—on or about the 17th of July 1878—one George A. Wilson died in Grant parish at the residence of Warren and William Price. That—when Wilson died—he had, in cash, twenty-nine hundred and eighty dollars, which were *secretly and fraudulently* taken by William Price, his son Warren, and one Henry Holburn, who—with *the very money* thus taken—purchased more than one thousand dollars worth of goods, found and sequestered in their possession.

The curator of Wilson's estate claims those goods as belonging to said estate, and swore that he feared that those parties who—before and up to the death of Wilson—were too poor to pay in cash the bare necessities of life—would, during the pendency of this suit, conceal, part with or dispose of said goods.

On these allegations he prayed for and obtained an order commanding the sequestration—not only of the goods—but also of a crop of growing corn and cotton. The crop was released on bond, and—it is evident—not one of the curator's allegations authorized its sequestration.

Defendant's counsel moved to dissolve the sequestration, on the grounds:

1. That the affidavit is defective, vague and uncertain, unfounded in fact and in law.

2. That plaintiff did not swear to the ownership of the sequestered property, or that he has—on the same—a lien, privilege or mortgage.

The sequestration was dissolved and plaintiff has appealed.

The affidavit attached to the petition may be unfounded in fact; but the curator has sworn to every fact which he has alleged, one of which is that the goods belong to the succession of Wilson. The prayer of his petition is not as full as it might have been: it—however—leaves no doubt that he is suing to recover what may be left of the money alleged to have been stolen from the succession, and for the possession of the goods purchased by the suspected thieves and paid for by them with a part of the stolen money.

If—as charged—defendants did steal those funds; if—with those funds—they paid the price of the goods, have they acquired, as to the goods thus paid for, a title sanctioned by any law, and which can justly be recognized by any court? Most assuredly not. If that title, which *has passed* from the merchants who sold, has *not vested* in the thieves

who bought, who can have a higher right to the goods, and by whatever name that right may be called, than the despoiled succession?

Plaintiff's allegations—we are told—are based upon mere suspicion? If so, why did defendants close the door, by their motion, against the evidence which might have dispelled that suspicion? Why did they admit, even for the purposes of the trial of that motion, that—at his death—Wilson had the amount of money claimed against them; that they took it secretly and fraudulently, and that it was with that money that they purchased the sequestered goods? It was their right to risk that admission; but the exercise of that right was and still is—for the purposes of this trial—nothing less than a bold confession that they have committed the crime charged against them.

The chosen depositary and attorney-in-fact are each bound to restore to the depositor and principal, even that which they have unduly received; and it cannot be that thieves are entitled to a favor or privilege which would be denied to confidential agents. That an action lies against them, for the recovery of the money stolen, is indisputable; but that action would be as barren as insufficient, when—as in this instance—the fruits of the alleged crime appear to be their all, or at least all that can be reached by legal process.

C. C. 2964 (2935)—2962, (2933)—3005 (2974).

"L'intérêt public et la morale—said Troplong—veulent que l'auteur d'une mauvaise action n'en retire pas de profits qui l'encouragent à mal faire; et, dans le doute, il vaut toujours mieux préférer l'interprétation la plus défavorable à celui qui a offensé l'honnêteté publique, et la mieux appropriée à sa punition."

Troplong, du Mandat, p. 409.

When—as remarked by Mr. Story—the profits are made by a violation of duty, it would be obviously unjust to allow the agent (and much more unjust to allow a thief,) to reap the fruits of his own misconduct; and as held by this court—when there has been such an appropriation of the trust property that it can be clearly identified, the change which it has undergone in point of form, should not be permitted to frustrate the pursuit of the principal, and—at his expense—put a profit in the agent's pocket.

Story on Agency, 207. 4 A. 415.

In New York a majority of the judges of the Court of Appeals held "that it is an elementary principle in the law of all civilized communities, that no man can be deprived of his property, except by his own voluntary act, or by operation of law; that a wilful wrongdoer acquires no property in the goods of another, either by the wrongful taking or by any change wrought in them by his labor or skill, however great that change may be."

The same principle is to be found in the Digest of Justinian. "If any one shall make wine with my grapes; oil with my olives, or garments with my wool, knowing that they are not his own, he shall be compelled by action to produce the said wine, oil or garments."

In his Commentaries, the late Chancellor Kent declared that the English law will not allow a man to give a title to the property of another upon the principle of accession, if he took the other's property wilfully as a trespasser; and that it was settled as early as the time of the Year Book, that *whatever alterations* of form any property had undergone, the owner might seize it in its new shape, if he could prove the identity of the original materials."

Relying on those authorities, the New York court decided, with but two dissenting opinions, that where a quantity of corn was taken from the owner by a wilful trespasser and converted by him into whisky, the whisky belonged to the owner of the corn. It is manifest that any other conclusion would eradicate the ancient and respectable distinction established by the pronouns "mine" and "thine."

3 N. Y. Comstock's Reports, p. 379.

In "Newton vs. Porter," the Supreme Court of New York said: "It was the felons who changed the stolen bonds *into money*, and—as found by the judge—the *same money* was changed into *mortgage and notes*." There is no dispute about the following it and its identity, or of its conversion into the obligations in question. It was no *bona fide* purchaser that wrought this change; and some of these obligations came into the hands of the defendants, or some of them, with the knowledge of the larceny. The question before the court was, whether the *proceeds* of this stolen property could be recovered, by plaintiff, of the parties so holding it. The learned judge who found the facts, thought there was no trust, and because there was no trust he dismissed the plaintiff's bill. This was clearly error. By every principle of natural equity and justice, the defendants were bound to hand over the *moneys* and *obligations* which were the *conceded avails* of the stolen bonds. * * It would be monstrous, indeed, if our law was such that, when the felon is expert enough to place his unrighteous *gains* in the hands of another, they can not be followed and obtained, and this because the holder can not be regarded as a trustee. * * * We have no such ungracious doctrine incorporated in our jurisprudence. * * * The owner of stolen property, or the *avails thereof*, clearly traced and proved, can recover it by any proper action, in whose hands soever it may be found; and no law is to be found that throws around the thief its technical protection.

5th Lansing's Report, p. 421.

One, whose money has been stolen, and used by the thief to pay the price of property, which is found in the thief's possession, can—at his

option—sue either to recover the money, or the property. As to third parties, he may lose his title, but—under no circumstances—can his title be considered as inferior to the insolent pretension of the rascal by whom he was robbed.

The curator of Wilson's estate has sued to recover the money and the goods; and defendants who—by their motion to dissolve on the face of the papers—have tacitly confessed the charge proffered against them, and tacitly admitted that they have no right to the sequestered goods, or to their possession, cannot, legally, control the title of the succession to said goods, and complain with bad grace of the form of the proceeding by which the curator seeks to wrest from them that which—by an inference authorized by their own course—belongs to the presumed victim of their presumed crime.

The facts alleged and sworn to by the curator do disclose a sufficient cause for the issuance of the writ of sequestration, and—as to that cause—the law, by implication, if not otherwise, is not absolutely silent. Were it silent, this is—manifestly—one of the few instances when an appeal would have to be made to natural law and reason, to baffle and to defeat a criminal and infamous speculation.

Sequestration—it is said—is a harsh, a rigorous remedy, and mere grounds of suspicion—when extremely slight—do not authorize the issuance of the writ. This we admit; but we do not consider as slight the suspicion which arises from the willing and tacit admission of a party; nor can we consider as rigorous and harsh the only remedy which can effectually be resorted to, by one who has been robbed of his purse, to prevent the thief from disposing—to his prejudice—of the property purchased with stolen money.

Those who find that which has been lost, or that which—during a storm and to save a vessel—is cast into the water, are bound to restore it to the lawful owner. The possession of those who steal from a dead man's purse is far less respectable than the possession of those who find on a public route or on the bosom of the sea. To the stolen money, or to whatever they may buy with that money, they—themselves—can acquire no title, not even by prescription. C. C. 3424 (3387).

In the interest of defendants themselves, for it may be that they are not guilty; and—if they are guilty—in the interest of society and justice, the charge made against them by the curator, must be investigated.

It is—therefore—ordered, adjudged and decreed that the judgment appealed from is annulled, avoided and reversed, and this cause remanded to the lower court to be proceeded with according to the views herein expressed and according to law; the costs of the appeal to be paid by defendants.

DISSENTING OPINION.

MANNING, C. J. In order to maintain the sequestration in this case our assent is required to this proposition, based upon the following state of facts, or allegations thereof in the petition—that Wilson died, having in his possession as owner nearly three thousand dollars in U. S. Treasury notes, no portion of which could be found when the inventory was taken—that the defendants lived under the same roof that he did, and under which his store was kept, and previous to his death were so impecunious that they had not wherewithal to buy the necessaries of life—that shortly after his death, they or some of them bought a stock of goods, for which they paid one thousand dollars cash—that the money thus paid is a part of that which Wilson had at his death—*ergo* the goods belong to his succession, and Pirtle as its representative is the owner of them, and is authorized to sue out a writ of sequestration in its behalf. I do not think that is true either in law or in fact. In the domain of morals and conscience, it is true that the succession ought to have the goods if they were bought with its money, but the legal question is, is the succession the owner of the stock of goods?

It cannot fail to be observed that the claim of ownership is based upon an inference, or a series of inferences. As Wilson had this money prior to his death, it is inferred that it was, or ought to have been, among the effects of his succession. As the defendants theretofore had no money, and lived in the house where this money was, and thereafter used money in the purchase of goods, the inference is that they stole the sum with which the purchase was made. As the money thus used belonged to Wilson, the legal conclusion is drawn that the property acquired by the purchase belongs to Wilson also, and upon his ownership (or that of his succession) is based the right to the writ.

The criminal aspect of the question is entirely outside of, and beyond our present inquiry. I think the statement of the facts, assuming the truth of the plaintiff's allegations, shews very conclusively that the succession is not the owner of the goods. If we substitute to the inference, that the defendants did steal the money, the assumption of the larceny as a fact, still it would be true that the succession was not owner of the property bought with the stolen money. Suppose the stolen money had been applied to the purchase of a tract of land, instead of a stock of goods, would the succession have become thereby the owner of the land? If so, and other persons were claiming it, the succession could recover it of them in a petitory action, and the proof to authorize such recovery would be the title of defendants, explained and altered and supplemented by parol proof that these defendants, in whose name the title is placed, stole the sum which forms its consideration.

Pirtle vs. Price et al.

Conservatory process, such as this, being a harsh and extraordinary remedy, and obtained *ex parte*, it has been uniformly held that the party invoking it must adhere rigorously to the requirements of the law. Grounds of suspicion merely will not authorize a resort to it. *Stetson v. Leblanc*, 6 La. 266. It cannot be extended by implication to cases not included in the enumeration of the causes for which it is allowed. Thus—a party, having sold a stock of goods on a long credit and being holder of some of the sale notes, could not sequester on an allegation that the vendee is selling at auction to protect an indorser of the notes, who was his fraudulent confederate, the other indorsers having failed, and that the vendee was conducting his affairs out of the usual course of business, and his apprehended insolvency may defeat the privilege of the plaintiff as vendor. *Barriere v. Leste*, 9 Annual, 535.

There was never any ownership or possession of the goods by Wilson or his succession. He owned money which was suspected to have been stolen and used in their purchase, and however much this suspicion, ripening into a proved fact, may entitle his curator to a judgment for the sum stolen, it does not make him the owner. There was no commingling of these goods with those actually owned by Wilson at the time of his death, if he had a stock on hand then. The petition does not allege any commingling of two stocks through the defendants' fault, and the impossibility of separating them, if indeed that would justify a writ for the whole. The prayer for the writ is solely as to the goods which the defendants bought.

Sequestration can be ordered at the request of one of the parties to a suit when he sues for the possession of movable property, Code Prac. art. 275, but he must shew a *prima facie* right to that possession, and such right is not shewn in this case.

I think the judgment of the lower court should be affirmed.

No. 7420. .

RAPHAEL HEBERT, ADMINISTRATOR, VS. E. M. LEFEVRE ET AL.

Where an hypothecary action has been instituted against a third possessor of the mortgaged property, a non-resident warrantor, who has been called in warranty by the third possessor, is not entitled to have the cause removed to the Circuit Court of the United States, under the act of Congress of March 2, 1875.

When it appears that a case arises under the constitution, or a law of the United States, it can be removed to the U. S. Circuit Court when the application to remove is made at the term of the State court at which it could first have been tried, and before the trial thereof.

The "term of the State court," referred to in the act of Congress providing for the removal of cases, means the first term the case would be *triable* under the laws and rules of practice of the State, and not the term at which, under a press of business, it may actually come up for trial.

APPEAL from the Fifth Judicial District Court, parish of West Baton Rouge. *McVea, J.*

Barrow & Pope for plaintiff and appellant.

Singleton & Browne and *H. M. Favrot* for defendant and warrantor, appellees.

The opinion of the court was delivered by

DEBLANC, J. In March, 1878, Raphael Hebert, acting as the administrator of the succession of François Bonnemaison, filed—in the Fifth District Court of the State—an action against Emile M. Lefevre, the third possessor of a tract of land alleged to be subject to a judicial mortgage, which resulted from the recording of a judgment obtained by and belonging to said succession.

The object of plaintiff's action is to compel Lefevre to give up the tract of land referred to, or pay the amount for which it is averred it stands hypothecated.

Lefevre first excepted to, and then answered plaintiff's demand. On his application, Mrs. Latham—a resident of the State of Virginia—from whom he acquired the land sought to be subjected to the mortgage—was called in warranty. She appeared, and—on two grounds—asked and obtained, from the State court, an order removing the cause to the Circuit Court of the United States. Those grounds are:

1. That the real controversy, in this suit, is between her—a resident of the State of Virginia—and the succession of Bonnemaison, opened in Louisiana.

2. That this case arises under, and involves the construction of a law of the United States.

Mrs. Latham's application is—partly—based on the section of the act of Congress of the 2d of March, 1875, which provides "that, when in any suit mentioned in this section, there shall be a controversy, which is WHOLLY between citizens of different States, and which can be FULLY determined as between them, then either one or more of the plaintiffs or defendants, actually interested in such controversy, may remove said suit to the Circuit Court of the United States for the proper district."

Mrs. Latham's counsel contend that, as to its merits—this controversy can be *wholly* determined between her—as a warrantor—and the succession of Bonnemaison, the alleged mortgagee.

The 68th article of the Code of Practice provides that, "if the hypothecated property be neither in the possession of the debtor nor of his heirs, but in that of a third person, the creditor has *his action against that person*, in order to compel him either to give up the property, or pay the amount for which it stands hypothecated."

A call in warranty is a demand incidental to the suit, and *must be determined with it*. "If the defendant be cast in the action, the court—

 Hebert, Administrator, vs. Lefevre et al.

when it gives judgment against such defendant, must—at the same time—render a judgment in favor of the defendant against his warrantor.” The law so provides.

C. P. 362, 363, 385.

It is, then, a mistake to say that, in this suit, Mrs. Latham is the only real defendant. The pretended mortgagee has no action against her to compel her to surrender the property or pay the amount of the mortgage claim. The *suit* itself is between the succession of Bonnemaison and the third possessor—the incidental demand between the third possessor, a resident, and his vendor, a non-resident of the State. If plaintiff's action be maintained, two judgments must be rendered—one, the first, against Lefevre, acknowledging the existence of plaintiff's mortgage, and ordering its enforcement; the other, in favor of Lefevre and against the warrantor. No decree enforcing the promised warranty can precede that by the execution of which a purchaser is to be evicted; and in such a suit as we now have under discussion, the purchaser is always the principal, and never a nominal defendant. Without a notice to, or proceeding against the third possessor, there can be no hypothecary action. He is not merely a necessary party to such a proceeding, he is an indispensable one.

Ante p.

It is manifest that this suit is not *wholly* between citizens of different States, and that, not only it cannot be fully determined, but—still more—it cannot be determined at all, between exclusively the plaintiff—a succession opened in this State, and the warrantor, a citizen of the State of Virginia.

Considering the nature of the pleadings, the time at, and the manner in which the judgment or judgments is or are to be rendered, this controversy cannot be divided, partly retained and partly tried in one jurisdiction, partly transferred and partly tried in another. The incidental demand and the main action have—by the parties' course—been irrevocably linked to one another, and the former cannot drag the latter from the State to the Federal jurisdiction—but they can together, and under a proper application, be removed to that jurisdiction.

Does this case arise under the constitution or a law of the United States?

If it does, were the applications to remove it made—as required by the congressional statute—at the term of the State court at which it could first have been tried, and before the trial thereof?

I.

According to the averments of the petitions for the removal, what are the facts?

The land on which plaintiff seeks to enforce the judicial mortgage

 Hebert, Administrator, vs. Lefevre et al.

which secured the claim due to the succession of Bonnemaison, was surrendered by Daniel Hicky to his creditors, sold free from incumbrances, under a decree of the district court of the United States, sitting in bankruptcy, and—at that sale—purchased by Mrs. Latham, a creditor of Hicky; and that—subsequently—by another decree of said court—her privilege and lien were recognized as the first recorded against the property thus purchased by her, its price applied to their satisfaction, and all the other incumbrances bearing on said property ordered to be erased and cancelled. A personal notice of the proceedings which resulted in the decrees referred to, was—it is alleged—served on the administrator of the succession of Bonnemaison.

The right of the Federal court to inquire into and ascertain the validity, extent and rank of mortgages and other securities, and—on application of the assignee—to order incumbered property to be sold free from incumbrances—the liens being transferred to the fund in court—is a right which—now—cannot be successfully disputed, and which—in argument—was conceded by plaintiff.

Bump's Law and Practice of Bankruptcy, 9th edition, p. p. 174, 618. 3d How. 292.

This case—then—does arise under a law of the United States, and the rights set up by Lefevre and Mrs. Latham may be defeated by one construction of that law, or sustained by the opposite construction.

II.

This suit was filed in the State court on the 18th of March 1878, the call in warranty on the 15th of April, and the warrantor cited, through her agent, on the 27th of said month. That agent resides at one hundred and twenty miles of the court house from which the citation issued, and the warrantor being entitled to the same delays as the defendant, this cause could not have been tried at the April term of the State court.

C. P. 380, 381, 382, 383, 384, 385.

"The word *term* as here used means—according to the construction which it has received in the eighth judicial circuit—the term at which, under the legislation of the State and the rules of practice pursuant thereto, the cause is first triable, i. e. subject to be tried on its merits, not necessarily the term when, owing to press of business or arrearages, it may be first reached, in its order, for actual trial. * * * It was—said Mr. Dillon—the obvious purpose of Congress, by the use of the words "before or at the term at which the cause *could* be *first* tried, to require the election to be taken at the first term at which—under the law—the cause was triable *on its merits*."

Southern Law Review, July 1876, p. 311, 312.

After the call in warranty, the term at which the present case could

 Hebert, Administrator, vs. Lefevre et al.

have first been tried on its merits, was the December term, and it was then that the warrantor and third possessor applied for and obtained its transfer.

The application was made within the delay prescribed by the act of Congress, and the nature of the subject matter of the controversy authorized the removal.

It is—therefore—ordered, adjudged and decreed that the judgment appealed from is affirmed with costs.

 No. 7428.

JULES LACOSTE VS. CONRAD DUVIE.

Where the plaintiff in a sequestration suit has been *nonsuited*, the surety on the sequestration bond, when sued by the defendant for damages, has a right to introduce evidence to show that the property sequestered did not belong to the defendant.

A PPEAL from the Fifth District Court, parish of Orleans. *Rogers, J.*
Hornor & Benedict and *Francis W. Baker* for plaintiff and appellee.

T. A. Bartlette for defendant and appellant.

The opinion of the court was delivered by

SPENCER, J. Joaquin Roses brought suit against Lacoste and had a distillery, its appurtenances, and some liquors sequestered on the allegation that they belonged to a partnership existing between him and Lacoste. He prayed a settlement of the partnership, and that he be decreed owner of one half its property, rights, credits, etc.

Conrad Duvie was the surety of Roses on the sequestration bond.

Lacoste's answer was a denial generally and specially of the alleged partnership. On February 2, 1878, there was signed a final judgment dismissing the suit of Roses as in case of nonsuit. On March 28, 1878, Roses moved for and obtained an order of appeal. Not having been taken within ten days, that appeal is only devolutive, and does not suspend proceedings against Roses and his surety for damages.

The present suit is brought against Duvie, the surety, alone, for damages resulting from said sequestration, plaintiff alleging that Roses is impecunious and utterly insolvent, and that nothing can be made out of him on execution.

On the trial the surety offered evidence to show that Lacoste was not the owner of the goods sequestered, and consequently suffered no damages by their seizure. This evidence was rejected on the ground that the question of ownership could not be raised by the surety. We

Lacoste vs. Duvie.

think the court erred. The judgment in this case was one of *nonsuit*, and does not therefore even prevent Roses from re-asserting his ownership of the property. For a stronger reason, it does not preclude his surety, as to whom a final judgment against the principal would be only *prima facie* evidence of liability. Certainly, if Lacoste was not owner of the property sequestered, he ought not to recover by way of damages the value thereof, as he seeks to do and has done in this case. The evidence should have been received.

It is therefore ordered and decreed that the judgment appealed from is reversed; and it is now ordered that this cause be remanded, to be proceeded with according to law.

No. 7318.

THE STATE VS. JOHN JOHNSON.

An objection to the manner of drawing a *venire* can not be successfully made, unless made on the first day of the week for which the *venire* was drawn.

Whether certain interrogatories, objected to as leading and tending to elicit mere opinions instead of facts, should be put to a witness, is a matter that rests in the sound discretion of the court.

Evidence offered in defense, and not in rebuttal, in a trial for murder, to show that shortly before the homicide another party had publicly threatened to kill the deceased, when neither the party's name, nor any of the surrounding circumstances of his alleged threat is made to appear, is not admissible.

A remark by the judge to the prosecuting officer in a criminal proceeding warning the latter to examine the witnesses carefully in order to avoid the taking of bills of exception, can not tend to the prejudice of the accused, and therefore is not a ground for disturbing a verdict.

A PPEAL from the Seventh Judicial District Court, parish of Pointe Coupée. Yoist, J.

H. N. Ogden, Attorney General, for the State.

Robert Semple, Charles Parlange, and Charles W. DuRoy for defendant.

The opinion of the court was delivered by

DEBLANC, J. Defendant was tried for murder. The first time he was found guilty without capital punishment, and sentenced as the law prescribes. He appealed and we remanded the case, "on the ground that evidence rejected by the lower court might have shown that persons with whom the deceased quarreled a few days previous to the murder had more reasons than the accused for committing the crime. There were no witnesses to the homicide, and the prosecution resting on circumstantial evidence, the rejected proof was as proper as legal." It was offered in rebuttal, and reason and law commanded its admission.

The second trial took place, defendant was found guilty of manslaughter, and sentenced to twenty years imprisonment at hard labor. He has again appealed, and—to annul the verdict rendered, and reverse the sentence pronounced against him—He urges four different reasons :

1. The entire *venire*, from which was drawn the jury by whom he was tried, was illegal and void.

2. Leading questions, and questions which tended to elicit opinions and not facts, were propounded to the State witnesses.

3. He was not allowed to prove that deceased had, a short time previous to his death, quarrelled with another party, who had publicly threatened to kill him.

4. A remark from the presiding judge to the district attorney was calculated to prejudice the jury against the prisoner.

I.

The objection to the manner in which the jury had been drawn was not made on the first day of the week for which they had been drawn. It could have been successfully made but on that day. Act of 1877, p.

II.

The questions excepted to as being leading and as tending to elicit mere opinions, are these: The district attorney asked one of the witnesses :

1. Did the deceased—during the 1st, 2d, 3d or 4th visit you paid him, make any declaration, and did he seem to be conscious of his condition ?

2. Did he—from his actions—seem to fear that he was going to die ?

3. Did he—at that time—make any voluntary declaration ?

The question propounded to a witness should not suggest but one, a desired answer, nor should it be a riddle. A witness is not a wizard or a sibyl : he must be comprehensively informed of the subject in relation to which he is to be examined : his attention can properly be directed, by the question, to that particular subject, and—there—left in charge of his memory. Under the too rigid rule invoked by defendant's counsel, no one could successfully testify in a court of justice, unless he could—on being vaguely interrogated—guess what facts, what dates, what circumstances he is expected to disclose.

The rule—as said by Mr. Greenleaf—is to be understood in a reasonable sense ; for if it were not allowed to *approach* the points at issue by leading questions, the examinations would be most inconveniently protracted. Indeed, when and under what circumstances they may be put, is a matter resting in the *sound* discretion of the court, and not a matter which can be assigned for error.

Greenleaf on Evidence, vol. 1, Nos. 434, 435, 447.

In answer to the questions excepted to, the witness was not necessarily bound to express an opinion: he could have testified as to his belief, and the facts which induced it. Though one may not always be able to know whether another is going to die, he can almost invariably discover whether the other is himself under that impression. Those who—for even a few months—have stood by the side of a mortally wounded man, can never be deceived as to his hopes and his apprehensions: the light of the hope or shades of the apprehension rest on his brow: they are revealed by an inquiring glance, by the sound of his voice, by an anxious request, by the silent farewell which swells his heart and his lips; and—as well as the surgeon or the nurse—any one who has seen and heard a wounded man, can testify as to whether he left him under the impression that he was going either to live or to die.

1 L. R. 28.

III.

Defendant offered to prove—NOT IN REBUTTAL—but as a defence, at least we so presume from the judge's ruling, that—shortly before the homicide—another party had publicly threatened to kill the deceased. Who it was that so threatened, and where that party was when the homicide was perpetrated—whether on the spot, near to it, in the parish, in the State, on this continent or in this world, we are not informed. The bill of exception does not, in this instance, disclose any fact or circumstance which would have justified the admission of the tendered proof, and it was properly excluded.

IV.

The judge's remark, to which defendant's counsel objected, as one calculated to prejudice the jury against the prisoner, was addressed to the district attorney: he warned him to examine the witnesses so as to avoid the taking of any bill of exception, because—he said—this case had already been remanded on the most frivolous technicalities.

From that remark, howsoever incorrect it was, we can draw but one inference: it is that the judge *restrained* the district attorney in the examination of the witnesses who testified on the trial, and of this the prisoner can not justly complain: that instruction must, necessarily, have been favorable to the defence.

It is—therefore—ordered, adjudged and decreed that the judgment appealed from is affirmed.

Germaine, Tutrix, vs. Mallerich.

No. 5767.

MRS. M. GERMAINE, TUTRIX, vs. FRANK MALLERICH.

The sale of a deceased husband's property under executory process will be held invalid when it appears that the appraiser, by whose appraisal the property was sold, was appointed by the widow, and that she was not the agent of her deceased husband, or the legal representative of his succession.

A purchaser in bad faith is not entitled to have the purchase price tendered to him before the institution of a suit for the recovery of the purchased property.

The recital of an order of court in a sheriff's return is not a sufficient proof of the order.

The employment of an attorney to defend a suit does not authorize him to receive from the sheriff the proceeds of the defendant's property sold under judgment in that suit.

A purchaser in bad faith is liable for the fruits and revenues of the property while in his possession.

The mere fact that a widow appoints an appraiser, in the sale of community property sold under executory process, will not make the sale a valid one as to her half of the property, when it appears that she acted for her husband, of whose death she was ignorant.

A PPEAL from the Sixth District Court, parish of Orleans. *Saucier, J.*

McGloin & Nixon for plaintiff and appellee.

C. F. Huff and *F. Michinard* for defendant and appellant.

The opinion of the court was delivered by

SPENCER, J. Plaintiff as tutrix of the minor children of François Germaine, deceased, sues to recover two pieces of property in New Orleans, with their revenues. This property was sold and adjudicated to defendant on 7th July, 1873, under an execution issued on the judgment of Bruenning vs. said François Germaine, said judgment recognizing a mortgage and vendor's lien thereon.

Plaintiff alleges numerous nullities against the validity of said sale, and charges that the defendant was a purchaser in bad faith, and with full knowledge of the defects of said title, and is therefore liable for fruits and revenues.

The facts are, that François Germaine, who was a citizen and resident of New Orleans, went on a trip to Costa Rica, where he died on the 2d June, 1873, his wife, the plaintiff, and their children remaining in said city. The sheriff returns that he made the seizure of said property on 31st May, 1873; that the property was duly appraised by experts appointed by plaintiff and defendant. The proof is, that the defendant's wife appointed the appraiser by a writing wherein she states that her husband was absent. This appointment was made on or after 18th June. She does not sign as his agent, nor is there the slightest evidence that she was. Germaine's succession was not opened till some time in

Germaine, Tutrix, vs. Mallerich.

September, and plaintiff qualified as natural tutrix in October, 1873. We think that upon the state of facts here disclosed the sale to the defendant was illegal and null. It requires no citation of authority to show that a man's wife, or his widow, for that matter, as such, has no authority to act for him in judicial proceedings. She had no such powers of agency. Hence the question discussed by defendant's counsel as to the effect of the unknown death of the principal upon the subsequent acts of the agent does not arise, and requires no discussion.

It is equally elementary that after the death of a defendant in execution proceedings to sell his property, without making his heirs or legal representatives parties, are illegal.

We therefore hold that the sale to defendant was null and of no effect, and did not divest the succession of Germaine of the property in question.

But defendant's counsel, in their *brief*, urge that the plaintiffs should have tendered him the amount he paid on his bid. No such objection or exception is made in defendant's pleadings. But had it been made, we think that it would have been unavailing, for the reason, as we shall see hereafter, the defendant was a purchaser in bad faith, and had by his own confession full knowledge of Germaine's death before he accepted the sheriff's title, on 28th August, 1873. We understand the rule requiring previous restitution or tender to be an equitable relief granted only to purchasers *in good faith*. To extend the rule further would be to allow purchasers to take advantage of their own wrong. It is purely an equitable rule, and would be abused by allowing wrong-doers to avail themselves of it as a condition precedent to the undoing of their own illegal acts. C. C. 3453; 30 A. 174; 6 A. 585; 26 A. 188, 343; 24 A. 472; 2 A. 543; 6 N. S. 674; 3 L. 543.

It is further objected in defendant's *brief*, but nowhere in their pleadings, that plaintiffs are estopped from contesting this sale, first, because the sheriff says in his return that by "an order of the Second District Court in the matter of the succession of F. Germaine, No. 36,473," he was directed to hold on to the proceeds of sale. As we have seen, the succession of Germaine was not opened until the middle of September, 1873, long after this sale, and the number of that succession is shown to be 36,611. Even if it were conceded that the tutrix could ratify the sale in this way (which we think she could not do) the mere recital of what the sheriff supposed to be such an order is not sufficient proof of it. Secondly, the sheriff recites in his return that he paid to Braughn & Buck "defendant's attorneys," the surplus of the price, to wit, \$35. We have seen that defendant was dead. His attorneys had no mission or power to represent him, therefore, even if they had before his death. It does not follow that because an attorney is employed to de-

Germaine, Tutrix, vs. Mallerich.

pend a suit, that he has authority to receive from the sheriff the proceeds of defendant's property sold under judgment in that suit.

The only remaining question is as to the fruits and revenues. The evidence satisfies us, as it did the judge *a quo*, that the defendant was a purchaser in bad faith, and therefore liable to pay the fruits and revenues. Had the defendant claimed to compensate this demand by the payment he made, we should have allowed it. But no such defense was made or is now made. He simply asked that Bruenning's heirs be cited in warranty, and condemned to pay him a reasonable sum for his attorney's fees, and that his rights against them in other respects be reserved to him. The court *a qua* reserved his rights as prayed for. He has recourse upon them, or if he has paid the mortgage held by them, perhaps he would have his recourse on that, as subrogee.

The judgment is affirmed at the costs of defendant.

ON APPLICATION FOR A REHEARING.

Defendant's counsel complains that the court has ignored that part of his argument in which he claims that the sale to him was at least valid to extent of the widow's half, it being community property. This argument rests solely and exclusively upon the fact that she, after the husband's death, appointed an appraiser.

It is elementary that an act done by an heir or surviving wife, in ignorance of the death of the ancestor or husband, and therefore with no intent to accept, will not constitute such acceptance.

It is *the intent with which the act is done* that the law regards chiefly. It is patent on the face of the paper whereby she appointed the appraiser that she had no such knowledge and no such intent. She professes to act for her husband, "*who is now absent from the city.*"

The counsel also complains bitterly of the decree holding him to be a possessor in bad faith. The district judge, who saw and heard the witnesses, so concluded. An examination and re-examination of the facts and evidence lead us to the same result. It is at all times an unpleasant, and often a distressing duty, which courts are called upon to perform, to decide in the last resort upon the rights of their fellow men. But after a full and conscientious investigation of the facts, it is our duty to apply the law to them as we find them.

We see no possible ground to doubt the nullity of this sale. We think the weight of evidence discloses in the defendant such knowledge as renders him a possessor in bad faith. Nor do we see that the ultimate effect of our decree is so crushingly disastrous as the counsel pictures. In every event, and *whether in good or bad faith*, his client would owe the fruits and revenues from and after the 17th November, 1873, the

Germaine, Tutrix, vs. Mallerich.

date of bringing this suit. The effect of bad faith is to make him liable for four months longer time. If the rents were not worth the sum claimed, defendant should have rebutted the positive and uncontradicted proof that he was receiving \$75 per month. He did not do so, and we must presume he did not because he could not.

We adhere to the views expressed in our former opinion, that restitution as a *condition precedent* to an action of nullity can be demanded only by purchasers in good faith. But while a purchaser in bad faith can not invoke this equitable rule, he may well set up by way of reconvention a claim that in case he be evicted he have judgment for moneys expended for improvements and taxes, as well as for the amount of the sum paid in satisfaction of the plaintiffs' debts. If the sale is annulled the judgment debt and mortgage revive, and if defendant has paid them he is legally subrogated to them.

But we can not render such judgments where there is no pleading or prayer to support them.

Defendant's only prayer in this regard is that his warrantors be cited, and condemned to pay him a reasonable attorney's fee, and that his rights in other respects be reserved.

The rehearing is refused.

No. 7385.

A. H. SINGLETARY vs. J. R. SINGLETARY, SHERIFF, ET AL.

The house and grounds situated in the outskirts of an unincorporated town, which belong to a debtor who resides on the premises, and who has a wife and children dependent on him for support, and whose wife has less than \$500 worth of property, are exempt from seizure under the provisions of the homestead law.

A PPEAL from the Sixth Judicial District Court, parish of Livingston.
Duncan, J.

E. W. & S. M. Robertson and C. Ireson Bradley for defendant and appellee.

J. A. Addison and Hornor & Benedict for defendants and appellants.

The opinion of the court was delivered by

DEBLANC, J. In April 1873, plaintiff mortgaged in favor of Hugh Allison & Co. three lots of ground situated—one in Clio and two in Port Vincent.

Those lots were seized to satisfy the mortgage, and—of the three—that situated in Clio was sold. The intended sale of the others was enjoined, on the grounds:

1. That the notice required in proceedings *via executiva* has not been given.

Singletery vs. Singletery, Sheriff, et al.

2. That the lots which plaintiff owns in Port Vincent and the buildings thereon compose his homestead and are exempt from seizure.

His injunction was maintained and his creditors appealed.

The evidence shows that the two lots and the buildings thereon are occupied as a residence by plaintiff, his wife and his children, who are dependent upon him for a support: that said property is worth five hundred dollars, and that owned by his wife far less.

Under these circumstances, is plaintiff entitled to the exemption which he claims?

It is contended that he is not, and why? Because he occupies a residence which happens to be on the fraction of a plantation laid out in town lots, and because, instead of cultivating a field, he cultivates a garden and an orchard.

The representative of the parish testified, on the trial, that—as yet—Port Vincent is not incorporated.

As held in "*Baden vs. Reeves, Executor*," plaintiff's lots do not belong to the class designated as urban property, and the provisions of the homestead law do apply to his case.

27th A. 226, 227.

It is—therefore—ordered, adjudged and decreed that the judgment appealed from is affirmed with costs.

No. 4466.

DANIEL MULLIGAN VS. LOUIS VALLEE ET AL.

The insertion of a clause in a bond for the release of sequestered property to the effect "that the sureties shall satisfy such judgment as may be rendered in the pending case," is not authorized by law, and therefore is not binding on the sureties.

Where the sequestered property of a defendant has been released on bond, and it appears that whatever part of such property afterwards sold, or destroyed by use was replaced by the defendant by other property of greater value which was subsequently subjected by the sequestering creditor to the satisfaction of his judgment, the sureties on the defendant's release bond can not be held liable for any balance of the plaintiff's judgment that may remain unsatisfied.

A PPEAL from the Fifth District Court, parish of Orleans. *Leaumont, J.*

W. B. Lancaster for plaintiff and appellant.

Ogden & Hill for succession of Bell, defendant and appellee.

The opinion of the court was delivered by

DEBLANC, J. During the war—in 1864—Daniel Mulligan sued Philip Lynch before a federal court, and caused to be sequestered, according to the marshal's return—twelve horses, five carriages, one buggy, and

other movables being at the stables, at No. 99 St. Charles street, in the city of New Orleans.

The property thus sequestered was released and left in the possession of Lynch, who—to obtain its release—gave bond for six thousand dollars, with Louis Vallee and Wm. R. Bell—the defendants—as his sureties. That bond, made payable to the marshal, or his assigns, was—by the marshal—transferred to Mulligan, and the condition therein inserted is “that, if the said Philip Lynch shall not send the above described property out of the jurisdiction of this court, that he will not make an improper use of it, and that he will faithfully present the same, in case he should be decreed to restore the same to the said Isaac Edward Clarke, or shall satisfy such judgment as may be rendered in the suit pending, as above mentioned, then this obligation to be void, or else to remain in full force.”

Judgment was rendered against Lynch in the federal court, and—under an execution issued on that judgment—the marshal seized and sold thirteen horses, eight carriages, one buggy and harness, one spring wagon, one cow, two hearses and over one hundred coffins, cases and caskets.

The marshal seized and sold, under the execution, more than he had sequestered; but this—Mulligan contends—cannot avail the sureties on the release bond, because only a small fraction of the sequestered property was sold, and the sureties’ obligation was that, unless the whole of said property was returned, they would pay his judgment.

All of Lynch’s property was sold to satisfy the execution under which it was seized, and there remains due—on said judgment—a balance of \$1774 39c. The present suit was brought to recover that balance and some costs from the sureties of Lynch. Their defence is:

1. That their obligation was, under the law—not to pay the judgment obtained by Mulligan—but merely to return the property which was released on bond, and

2. That such of that property which was not returned, was exclusively the horses which died and the effects which were destroyed by wear and tear, but that those horses and effects were replaced by others of a like value.

The Code of Practice expressly provides that “a defendant against whom a mandate of sequestration has been obtained—except in cases of failure—may have the same set aside by executing his obligation, for whatever amount the judge may determine, *as being equal to the value of the property to be left in his possession.*”

C. P. 279.

“The security thus given by defendant, when the property sequestered consists in movables, shall be responsible that he shall not send

away the same out of the jurisdiction of the court ; that he shall not make an improper use of them ; and that he will faithfully present them, after definitive judgment, in case he should be decreed to restore the same to the plaintiff."

In *Carroll & Co. vs. Hamilton*, we said : that it is the value of the property, and not the amount of the judgment alone which regulates the obligations and responsibilities of the bondsmen. The judgment may be for more or less than the amount of the bond or the value of the property. If so, no more can be recovered than the amount of the bond or value of the property in the former case, and no more than the amount of the judgment, though less than either, in the latter case.

30 A. 523.

The condition inserted, by the marshal's deputy, in the bond which is the basis of Mulligan's action, to wit : "*that the sureties shall satisfy such judgment as may be rendered in the pending suit,*" is not a condition that he could, legally, have inserted in a bond furnished to release sequestered property ; and it is now settled that—in matters of this kind—the sureties' obligations must be construed by the law under which they are contracted.

2 L. 399. 9 R. 537. 6 A. 277.

As the amount of the bond is to be fixed with reference to the value of the property, and at an amount equal to its value, it is true—as a general rule, that, *prima facie* at least, the value of the property may be measured by the amount of the bond ; but—in this instance—a part of the sequestered effects were returned, and—in as much as the value of that part has not been established—we could not, if we were to hold that the sureties are liable, fix the extent of their liability.

Did Lynch violate the condition of his bond ? Did he send the sequestered effects out of the jurisdiction of the court, under whose mandate they were sequestered ? Did he make an improper use of them ? If he did, that was not shown. He sold, for \$150, the buggy mentioned in the marshal's sequestration, and—to replace it—bought a carriage for which he paid \$1200 ; and—after the release—though he could have disposed, not only of the property which had been returned to him, and of that which he thereafter acquired, when the marshal came with the writ of *feri facias*, he gave all he had, and more than—over three years before—the officer of the federal court had at first taken under the writ of sequestration.

The evidence leaves no doubt that Lynch replaced, by as valuable articles of property, those which he lost by the wear and tear, or otherwise. He delivered to the marshal, and the latter sold, under plaintiff's execution, whatever was left of the sequestered effects, when the last writ was executed, and—besides—many others which he would have

had no difficulty in placing out of the reach of that writ. Under these circumstances, we consider—as did the district judge—that Lynch has not violated the condition of his bond, and that his sureties have incurred no responsibility.

It is, therefore, ordered, adjudged and decreed that the judgment appealed from is affirmed with costs.

Rehearing refused.

No. 7365.

THE STATE VS. LOUIS O'GRADY ET AL.

A continuance can not be demanded in a criminal case on the ground that the court was not properly organized because the acting sheriff had been elected to and was serving in another office, when it appears that the successor of the acting sheriff qualified the day the motion for the continuance was made, and acted as sheriff on the trial of the case.

Where one of two men indicted for murder is acquitted, and the other convicted, the one convicted can not obtain a new trial on the allegation that he could prove by his co-defendant that the deceased threatened to kill him, and actually attempted to carry the threat into execution, when it appears by the terms of his own allegations that the attempts of the deceased to carry the threats into execution were not made until after the accused had inflicted the mortal wound.

A PPEAL from the Superior Criminal Court, parish of Orleans. *Whitaker, J.*

H. N. Ogden, Attorney General, for the State.

Belden & Duvinéaud for defendant.

The opinion of the court was delivered by

SPENCER, J. The defendants were indicted and tried for murder. O'Grady was convicted without capital punishment, Gainnie was acquitted. The former appeals.

No brief has been filed by his counsel ; but an examination of the record discloses—

First—A motion filed on sixth December, 1878, for continuance, on the ground that the court was not properly constituted, in that James D. Houston, who was acting as sheriff, had been elected Administrator of Improvements of the city of New Orleans, and had qualified as such on the fifteenth of November, 1878, and had since been acting as such administrator ; that thereby he ceased to be sheriff.

The court refused the continuance on this ground, but granted it until the thirteenth of December, on account of necessary absence of counsel for one of the accused. On same day, December 6, John Fitzpatrick, the newly elected sheriff, presented his commission and was recognized. The trial commenced on the thirteenth December, at which

State vs. O'Grady et al.

time the court was undoubtedly properly constituted. We do not desire to be understood, however, as intimating that a party charged with crime can be heard to raise as an issue that the ministerial and other officers of the court, actually and *de facto* acting as such, have no legal right to be such officers. We should never get a criminal tried at that rate. He would commence with a kind of collateral *quo warranto* as to the judge and then go on down through the official roster of the court.

Second—After conviction O'Grady moved for a new trial in order that he might have the benefit of the testimony of his co-defendant Ginnie, by whom he alleged he could prove that the deceased a short time before the killing had threatened him and followed him for some time that night with intention to kill him, the accused; that accused acted in self-defense in killing the deceased, because "when deceased was shot he arose to slay accused, and actually attempted to carry his threat into execution, and would have done so had not defendant in self-defense shot and killed him."

The showing for new trial is defective in form and insufficient in substance. If the evidence sought would have been, as stated in the affidavit, it would not have tended to reduce the crime to any degree below murder, since the attempt to carry the alleged threats into execution was only made after accused had done his deadly work.

The judgment and sentence appealed from are affirmed.

No. 6868.

THE STATE VS. LEE WATSON.

It need not appear in the record of a criminal case that the grand jury who found the indictment were sworn. Until the contrary be affirmatively shown, it will be presumed that the grand jury were properly organized.

Objections to the manner of organizing a grand jury can not be made after a plea, and trial. They should be made before pleading.

The verdict in a murder case will not be disturbed on the ground that the judge refused to charge that if the jury believed that when the accused did the killing he was insane from the use of intoxicating liquors or other poisons sold and administered to him by the deceased. Drunkenness does not excuse crime.

A PPEAL from the Second Judicial District Court, parish of Plaquemines. *Pardee, J.*

H. N. Ogden, Attorney General, for the State.

E. Howard McCaleb for defendant.

The opinion of the court was delivered by

SPENCER, J. The defendant was indicted for and convicted without capital punishment of murder. He appeals, and assigns as error ap-

parent on the face of the record that it does not appear by the record that the grand jury was sworn.

The record shows that sixteen persons named "were this day empaneled to serve as grand jurors;" that one of them was appointed foreman, and the charge of the court given; that the grand jurors appeared in open court, and through their foreman presented the indictment in this case, duly attested as "a true bill" by the foreman. The indictment recites that it was found by the grand jury, "duly empaneled and sworn." The accused was arraigned and plead "not guilty," was tried and convicted.

It has been held by this court that it must appear by the record that the petit jury trying the case has been sworn. *State vs. Gates*, 9 An. 94; *State vs. King*, 28 An. 425; *State vs. Douglass*, 28 An. 425.

In the case of *State vs. Tazwell*, 30 An. 885, in reference to the objection that the record did not show "that a grand jury was ever empaneled for the November term, nor that the person signing the finding as foreman was ever selected as such, or had authority so to sign," we said, "we do not consider it sacramental that these preliminary proceedings for the organization of the grand jury should be copied in the record. We will in the absence of specific objection and affirmative proof to the contrary, presume that it was properly organized. The cases cited by defendant have reference to the petit jury organized to try the case; that jury is specially organized with reference to the particular case to be tried, and it might well be that its organization, etc., should appear by the record; but the same reason does not exist as to the grand jury's organization."

We will only add that the grand jury is organized *for the term* and with reference to no particular case, while the petit jury is *for particular cases*. The former is to inquire into all crimes, the latter into some particular crime.

Objections to the manner of organizing the grand jury can not, we think, be urged after plea and trial. They are in the nature of objections to those "formal defects apparent on the face of the indictment" which must be urged before pleading. R. S. 1064.

The defendant also reserved a bill to the refusal of the judge to charge that, "if from the evidence the jury believe that the accused, at the time of inflicting the mortal stroke, was insane, and not capable of self-control, from the use of intoxicating liquors or other poison, administered and sold to him by the deceased, the jury should not find him guilty."

We think the judge properly refused this charge. It is too broad, and would have manifestly misled the jury into the belief that the frenzy of drunkenness was an excuse for homicide.

We think that the correct rule is stated in *United States vs. Clarke*, 2 Cranch. C. C. R. 158, that it must appear, in order to excuse the act, "that the prisoner, at the time of committing it was in such a state of mental insanity, *not produced by the immediate effects of intoxicating drinks*, as not to have been conscious of the moral turpitude of the act." Under this rule it is settled that insanity produced by *delirium tremens* affects the responsibility in the same way as insanity produced by any other cause. Amer. Crim. Law, § 32, vol. 1; *U. S. vs. Drew*, 5 Mason U. S. Reports, 28.

In other words, where drunkenness is the remote cause of the insanity, where the latter proceeds from causes which are themselves the effect of antecedent excesses, the party is not responsible. The law looks to the proximate cause of the insanity, and if that be drunkenness it is no excuse for crime.

The judgment and sentence are affirmed.

No. 7141.

FREDERICK WINTZ vs. C. E. GIRARDEY ET AL. BOARD OF ADMINISTRATORS OF CHARITY HOSPITAL, INTERVENORS.

The duty imposed by section 145 of the Revised Statutes of 1870 on goods sold at public outcry by licensed auctioneers, and which duty is to be paid by the vendors of the goods, is not a tax on property, and hence does not fall within the prohibition of the constitutional amendment of 1874 limiting taxation to 12½ mills. Nor is such a duty in violation of article 118 of the constitution requiring taxation to be equal and uniform, etc.

Section 145 of the Revised Statutes of 1870 has not been repealed by any subsequent general laws on the subject of taxation.

APPEAL from the Third District Court, parish of Orleans. *Monroe, J.*

E. Howard McCaleb and *T. Wharton Collens* for plaintiff and appellee.

E. Howard Farrar and *Frank C. Zacharie* for intervenors and appellants.

H. N. Ogden, Attorney General, for the State.

The opinion of the court on the original hearing was delivered by *SPENCER, J.*, and on the rehearing by *WHITE, J.*

SPENCER, J. The legal questions contested in this case are identical with those presented in "*Boye vs. Girardey, et al.*," reported in 28 A. p. 717.

The case has been argued with much ability on both sides, and the discussion has taken a wide range; but under the view we have taken it

will not be necessary to enter upon many of the interesting questions presented for consideration in argument.

We agree with our predecessors that the "duty" imposed by sec. 145, R. S., upon auction sales *is not a tax on property*, and does not fall within the prohibition of the amendment of 1874 limiting taxation to 12½ mills.

The sale of property at public auction is not a matter of common and natural right, beyond the control or even prohibition of the legislative power. This State, in common with all others, has constantly exercised the most absolute and complete control of the matter from its very organization. The "duty" in question has been levied upon auction sales without challenge, since the act of January 15, 1805. The Legislature has at all times prescribed the qualifications of auctioneers, and by acts of March 20, 1809, and March 10, 1813, limited their number, and even authorized the appointment of a special auctioneer for horses and cattle, and prohibited under severe penalties all persons not duly authorized from selling at auction. Many of these provisions find themselves in the Revised Statutes of 1870. By the existing law it is not every body who can be an auctioneer. The law requires him to be a "registered voter" in the parish where he exercises his calling, and he must obtain a license from the Auditor; that he must not be "a defaulter;" must "give bond" in favor of the Governor, and take the oath prescribed, "to secure the faithful performance of all the duties required by law toward all persons who may employ him," and toward the State. It prescribes the time and manner of accounting to the State, and enacts special rules for selling certain kinds of property, such as jewelry, and even prescribes the time of day and plans of sale, and the *per centum* of their compensation. For seventy years these acts have stood upon our statute books, and no one ever entertained the idea their enforcement infringed upon any of the natural and inalienable rights of man. We think that we may accept the interpretation resulting from this undisputed and long exercise of power, as conclusive that the State may place such restrictions and impose such conditions as it pleases upon this mode of selling, and even forbid it altogether. It may, therefore, impose a charge or duty on goods so sold, to be paid by the vendors availing themselves of the manifest advantages of that mode of sale which the State has organized and, in some sort, guaranteed through the bonds and oaths which it exacts for the security of the public.

Selling at auction through a licensed auctioneer is a privilege which the State may grant or withhold, and for the exercise of which, and as equivalent for the advantages of which, it may exact a "duty" or impose a charge, either in the form of a commission paid to the auctioneer, or to itself directly, just as it might impose a duty or toll on

goods transported over a turnpike or bridge established by the State for the safety and convenience of the public. We find no prohibition in the Constitution, express or implied, against this exercise of power; and not being forbidden, under a well-recognized rule of interpretation as to the powers of the States, it is permitted. Cooley, Cons. Limitations, chapter five, pages 85—92, and chapter sixteen of same work.

A tax carries with it the idea of imposition and compulsion. In the matter under consideration, selling at public outcry through a licensed, bonded, and sworn auctioneer, there is no such ingredient. It is purely optional with the seller whether he will or not avail himself of the advantages offered by the State upon the terms it proposes. If he do avail himself thereof he thereby agrees to pay the charges imposed. "*Volenti non fit injuria.*"

We see nothing in this which resembles a *property tax*, beyond the fact that the charge or duty imposed and exacted is calculated on the price of the property sold. It has none of the legal effects of a property tax. Its imposition is voluntary. It does not affect the property with lien or privilege, and is not a charge upon the property in the hands of any body.

Holding, therefore, that section 145 of the Revised Statutes does not impose a tax on property, it is unnecessary to consider the arguments based upon article 118 of the Constitution, and the amendments of 1874, prescribing equality and uniformity of such taxes, and limiting their amount. For the same reasons we hold that the said section has not been repealed by subsequent general laws on the subject of taxation. Not being a tax, the subject matter is not the same, and there is no conflict or inconsistency. It is not pretended that the section has ever been expressly repealed.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be avoided and reversed; and it is now ordered that plaintiff's demands, as well as those of Hafner and others in their petition of intervention filed July 3, 1877, be rejected definitively, and that plaintiff's injunction sued out herein be dissolved and set aside. That said intervenors pay the costs of their intervention in both courts, and that plaintiff pay all other costs thereof.

ON REHEARING.

WHITE, J. When a law imposing taxation is attacked on the ground of unconstitutionality, the tribunal to whom the issue is submitted for decision is apparently placed in the dilemma of violating one of two elementary rules of construction; the first, that every rule of reasonable construction by which a law is saved from constitutional inhibition is

to be sought after and adopted; the second, that laws imposing revenue are to be interpreted in favor of the tax-payer. Because of this ostensible clashing of those rules, we were led to grant a rehearing; and although thereon we have had the assistance of elaborate written and oral argument, we see no reason to modify the views we have already expressed.

The objections pressed upon our attention are of a two-fold nature: First, as to the intrinsic power to impose the tax complained of; second, as to the invalidity of the tax in consequence of the manner of its imposition, or its mode of operation when imposed.

The want of power is founded on the three following grounds: First, that article 118 of the Constitution contains an enumeration of the powers of taxation lodged in the law-making department of the Government; and that any exercise of the taxing power not therein specially included and delegated is *ultra vires*. Second, that the tax in controversy is an excise, and, therefore, beyond the scope of the general power of taxation, even if such power exist. Third, that the imposition, in whatever light considered, is a tax, and, therefore, beyond the limitation of 12½ mills, as fixed in the constitutional amendment of 1874.

First: The general and elementary rule of construction is that all powers not denied exist; and that courts will not lightly or inferentially deduce from a State constitution a restriction on the sovereign rights of the people, as vested in the law-making department of the Government. Seen by this familiar principle, can an enumeration, and hence a limitation of the objects of taxation, be possibly drawn from article 118 of the constitution?

That article reads:

"Taxation shall be equal and uniform throughout the State. All property shall be taxed in proportion to its value, to be ascertained as directed by law. The General Assembly shall have power to exempt from taxation property actually used for church, school, or charitable purposes. The General Assembly may levy an income tax upon all persons pursuing any occupation, trade, or calling, and all such persons shall obtain a license as provided by law. All tax on income shall be *pro rata* on the amount of income, or business done. And all deeds of sale made, or that may be made by collections of taxes, shall be received by courts in evidence as *prima facie* valid sales. The General Assembly shall levy a poll tax on all male inhabitants of this State, over twenty-one years old, for school and charitable purposes, which tax shall never exceed one dollar and fifty cents per annum."

In what words of the article is an enumeration to be found? In the provision that taxation shall be equal and uniform—which simply points out a mode of taxation, or rather throws safeguards around the meth-

ods of exercising the taxing power? In the provisions as to license and income, which are mentioned not as objects of taxation but simply for the purpose of defining the rule by which these taxes are or may be levied? If not then in these provisions, certainly not in that which in mandatory terms directs the levy of a poll tax. In fact, were the provision statutory the utmost latitude of construction could not torture its words so as to evoke from them an enumeration; and how much more is such the case when it is considered that the provision is a constitutional one, and, hence, to be examined with reference to the rule which teaches that every legitimate power not expressly and in terms denied is to be considered as existing.

Second: If the general power of taxation exists, as it undoubtedly does, we can not see how if the tax in question be an excise its validity would be impaired. If an excise tax, it is none the less a tax. If a tax, it is included in the general power of all taxation, unless we were to enunciate and enforce the illogical doctrine that the greater power of all and every taxation did not include the lesser power of excise taxation. Excise we are told is odious and not in harmony with free institutions. Courts can not look to the odiousness of a law for the purpose of defeating the legislative will. C. C. 20. The founders of the Republic certainly did not consider excise as dangerous to those institutions which they created and sought to transmit through the Constitution (Constitution of the United States, article one, section eight). Nor could the fathers of our State government have been greatly alarmed at the tax now before us, or looked upon it as either very tyrannical or odious, for it has been upon our statute books for more than seventy years.

Third: We consider the limitation adopted by the amendment of 1874 as one on the general annual tax for the support of the government, and, therefore, inapplicable to the provision now before us. Such conclusion was recently expressed as to a similar but statutory limitation on the taxing power of the city of New Orleans. *City vs. Metropolitan Loan Bank*, 31 Annual, 310. In fact, this meaning is the only one fairly to be deduced from the amendment itself. The General Assembly enacting it must have so intended; otherwise, we would be obliged to conclude that they intended to so limit the taxation as to make its total product inadequate for the payment of the constitutional expenses of the government. If the license tax had not been in contemplated continuance such would have been the inevitable result, and such tax is stricken with nullity if the construction claimed by plaintiff be correct.

The objections as to the mode are equally unfounded. It is insisted that the tax on the auction sale is a tax on the property sold. We held

that it was what it purports to be, a tax on the auction sale made by a licensed auctioneer, and not a tax on the property. Our conclusion was and is that such was the case, because the right to sell by a licensed auctioneer was not a necessary result of perfect ownership. Of course, if the mode of sale taxed was a mode resulting from and viscerally connected with the property, the tax on the mode would be a tax on the property. But the right to sell by a *licensed auctioneer* is not in any way an emanation of ownership. Such auctioneers are the creatures of the law, and whether in the proper sense of the words officers, they at least are the depositaries of a given quantum of power, the result of legal regulation, and that which is given could be taken away. We are referred to a recent case in which it is said the Supreme Court of the United States have held that a tax on auction sales is a tax on the property sold. *Cook vs. the Commonwealth of Penn.*, not yet reported. But the true issue therein decided was that a tax on auction sales of foreign goods, different from that levied on domestic goods, was a tax on the goods imported, and hence violated the Constitution of the United States. Instead of contradicting, this case supports the opinion we have formed. Necessarily the importation gave the right to dispose at the same rate of tax of the imported property as that charged domestic, and, therefore, the charge was on the property. So in *Brown vs. Maryland* a license to sell imported property was held to be a charge on the property, because the right to sell such property free from license was inseparably connected with the ownership. In that case, however, Chief Justice Marshall expressly drew the line of demarkation by saying:

"So if he sells by auction. *Auctioneers are persons licensed by the State*, and if the importer chooses to employ them, he can as little object to paying for this service as for any other for which he may apply to an officer of the State. The right of sale may very well be annexed to importation without annexing to it, also, the privilege of using the officers licensed by the State to make sales in a peculiar way."

These views dispose of the case, except in so far as it is contended that the tax or charge is unequal and not uniform, but it is clearly both within the classes defined by law, and the power to classify it is as necessary as the power of taxation itself.

It is therefore ordered that our former decree remain undisturbed.

No. 7302.

THE STATE VS. HENRY REVELLS.

Where the record in a murder case fails to show that the prisoner was present at any time during the trial, or fails to show that any plea was filed by, or in behalf of the defendant, the verdict in the case will be set aside and the judgment annulled.

An amendment of the minutes of the criminal court in any particular case, in order to show that the defendant was actually in court during the trial, may be made even after the record of appeal has been lodged in this court, provided the amendment is made contradictorily with the defendant. It can not be made *ex parte*, with no notice to the defendant.

The clerk of the court need only take the oath of jury commissioner once during his term of office. He need not take it at every drawing of a jury.

The testimony of the clerk of the court is not admissible to show that he was absent from the drawing of a *venire*, when the *proces verbal* of the drawing, signed by himself, recites his presence.

After the judge has annulled and set aside, in one case, a whole *venire* drawn for that term, he can not afterward during that term, in another case, hold such a *venire* to be good.

A PPEAL from the Thirteenth Judicial District Court, parish of East Carroll. *Hough, J.*

H. N. Ogden, Attorney General, for the State, submitted the case.

Chas. W. Pilcher for defendant.

The opinion of the court was delivered by

MANNING, C. J. The defendant was indicted for, and convicted of, murder, and was sentenced to be hung.

The trial was at the last December term of East Carroll, and the record fails to shew that the prisoner was present in court at any time during the trial. It does not shew any arraignment whatever. The record opens with the appearance in court of the grand jury, then follows the indictment, and the service of a copy of it and of the *venire* on the prisoner, and then the trial, conviction, and sentence.

The appeal was lodged here December 27, 1878. On Feb. 17, 1879 the district judge who tried the case made an order in chambers, directing the clerk to 'amend, correct, or supply the minutes of the court for the December term 1878,' so as to shew that the prisoner was present in court during the whole of the trial, and the clerk has done it.

It is impossible for us to sanction this mode of correcting the minutes, *ex parte*, and without notice to the prisoner. The minutes of court may be corrected in a criminal, as well as in a civil cause. The correction may be made out of term, or at a subsequent term, and although a different judge is on the bench. *State v. Folke*, 2 Annual, 744. There is no doubt that when the minutes fail to state the presence of a defendant in court on a criminal trial, and the fact is that he was present, the minutes may be corrected so as to shew the truth. It may

be done, either before the lower court has lost jurisdiction by granting an appeal, or if done after appeal, the corrected record will be brought up under a writ of certiorari from this court. *State v. Gates*, 9 Annual, 94. *State v. Carroll*, not yet reported.

But even if the minutes had been properly corrected, the failure to arraign the prisoner is a fatal defect. The absence of a plea is of itself fatal, *Ford's case*, 30 Annual, 311, and the arraignment precedes the plea, and in felonies is indispensable. *State v. Lartigue*, 6 Annual, 404. *Epps' case*, 27 Annual, 227. 3 Wharton Crim. Law, § 3153 *et seq.*

It is further urged that the drawing of the venire for the term was irregular—that the clerk did not take the oath of jury commissioner before the drawing, and was not in fact present thereat, and for other causes.

The clerk had before, and during his present term of office, taken the oath as jury commissioner. It is not necessary that he should renew it at every drawing during his term. The clerk was offered as a witness to prove his absence from the drawing. Objection was made that the *procès verbal* recited his presence, and he with the other commissioners had signed it. The objection was good. He will not be permitted to stultify himself by swearing that to be false which he had in a formal official Act asserted to be true.

The other causes are that only two of the jury commissioners acted in the drawing, that the general list had not been examined and names stricken therefrom, etc. It was urged that none of these objections could be heard, because the defendant did not make them on the first day of the term. It is true, no indictment had been found against the prisoner on the first day of the term, but we are not prepared to say that, when a man is charged with crime and is in prison under that charge, although not yet indicted, he will not be held bound to take notice of the meeting of court, and to make his objections to the venire then. But however this may be, there was a motion made to set aside the venire and annul the drawing by other persons on the first day of the term, and after hearing testimony, the drawing was adjudged null for vital irregularities, and the venire was set aside.

This was an end of that jury. The moment that decree was rendered, the men composing that venire were discharged from jury duty for that term under that drawing. The inevitable effect of setting aside a venire is to disperse the jury for the term, and until the General Assembly shall give to the courts the power to have another jury drawn immediately, and thus save the jury causes from going over, or the term from lapsing, it must produce that sometimes disastrous effect.

The judge appears to have ruled that a motion made by a defendant on the first day of the term, in anticipation of a trial he was to

undergo, could not inure to the benefit of other defendants. That is true in a measure, but in applying it here, he is confounding a motion to quash a particular indictment with a motion to set aside the whole venire. If the venire is bad and illegally drawn, the jurors composing it are no longer jurors, and the judge should have discharged them.

The conviction under such proceedings cannot stand for a moment. Therefore

It is ordered, adjudged, and decreed that the verdict of the jury is set aside, the judgment thereon is annulled and reversed, and the prisoner is ordered to be held in close custody to await a new indictment and a trial thereunder.

No. 7409.

JAMES A. METCALFE VS. CHARLES E. ALTER.

A confession of judgment made by a mother, in her capacity as tutrix of her minor child, is not binding on the minor or his property.

A written agreement between the undivided owners of certain real estate to make a partition of the same by dividing it in certain described lots does not become an actual partition and vest any separate part of the property in any one of them until the formation of the lots in accordance with the agreement.

A partition of property being an alienation by each of the co-proprietors, it follows that one agent or legal representative can not represent five or six co-proprietors in the agreement fixing the terms of the partition.

A PPEAL from the Thirteenth Judicial District Court, parish of Concordia. *Hough, J.*

Wade R. Young for plaintiff and appellant.

O. Mayo for defendant and appellee.

The opinion of the court was delivered by

MARR, J. Dr. Volney Metcalfe, who resided at Natchez, in the State of Mississippi, owned a plantation, in the parish of Concordia, called "Rota Quinta." He died in 1852, intestate, leaving a widow and six minor children. Mrs. Metcalfe qualified as natural tutrix of these children; and one of them died shortly after. She kept the property in division; cultivated the plantation for the common benefit; and paid the debts of the succession out of the proceeds of the crops.

In 1867 Mrs. Metcalfe and her children, all of whom had either attained their majority or had been emancipated, except James A. Metcalfe, executed a mortgage in favor of M. Gillis & Co., on the Rota Quinta plantation, to secure three promissory notes, two of them representing pre-existing indebtedness, the third being for a new loan. Mrs. Metcalfe acted in her own behalf, and as natural tutrix of James A. Metcalfe, in granting this mortgage; and the notes were indorsed by the oldest son,

Andrew W. Metcalfe, who about this time had the control and management of the plantation.

Two of these notes belonged to Charles E. Alter, who advanced the money loaned in 1867. One of them was for \$2500, the amount of the new loan, payable in February, 1868; the other represented a previous loan of \$2500, due in 1862, to which was added interest for five years at four per cent, making \$3000, payable in February, 1869. On the 6th of January, 1872, these two notes and interest remaining unpaid, Alter obtained judgment, by confession, against Mrs. Metcalfe and her children, with recognition of his mortgage rights, and a stay of execution to February, 1873, on condition of the payment of the note for \$2500 in February, 1872. A payment of \$2449 67 was made in March, 1873; and on the 28th February, 1877, execution issued for the remainder of the judgment. The sheriff seized the Rota Quinta plantation on the 2d of March, and advertised it for sale on the 7th of April. On the 6th April further proceedings were arrested by two injunctions, one at the suit of James A. Metcalfe, the other at the suit of Andrew W. Metcalfe, both filed on the same day.

These two suits must be considered separately; but it may as well be stated here that community did not exist between Mrs. Metcalfe and her husband with respect to this plantation, because the matrimonial domicile was in the State of Mississippi; and all the land was acquired by Dr. Metcalfe before the passage of the act of 1852, which subjected future acquisitions of non-residents to the law of community. As six children survived their father, each child inherited from him one sixth; and when one of them, John L. Metcalfe, died, his mother inherited from him one fourth of his undivided sixth, that is, one twenty-fourth of the whole; and his three brothers and two sisters inherited, in equal portions, the remaining twenty-three twenty-fourths. This made Mrs. Metcalfe's share five one hundred and twentieths, and the share of each one of her children twenty-three one hundred and twentieths of the entire property and succession.

James A. Metcalfe alleges in his petition that he inherited from his father one undivided fifth; that he was a minor at the time the notes and mortgage were given, and when the judgment was rendered; that the judgment was a nullity as to him; and that, by a partition between all the heirs on the 28th February, 1877, the land described in the petition, part of the Rota Quinta plantation, became his separate property. He prays that the judgment in favor of Alter be declared to be null and void so far as it relates to him: that an injunction be granted forbidding the sale by the sheriff, and that Alter be condemned to pay him \$250 damages.

The judgment of the district court decreed the judgment in favor

Metcalf vs. Alter.

of Alter to be null and void, as against plaintiff; and that the injunction be maintained to the extent of his undivided fifth interest in the Rota Quinta plantation, "the court being of the opinion that the partition set up as between the heirs is void and without effect as to the defendant, Charles E. Alter." Plaintiff appealed.

The formalities requisite, in order to bind the minor or his property were not observed by Mrs. Metcalfe; and the court correctly decreed the nullity of the judgment as to him. We think the court erred in maintaining the injunction to the extent of one fifth, because plaintiff really owned only twenty-three one hundred and twentieths. The difference is small; and defendant has not asked for an amendment, for that reason we presume.

The act of partition is a private writing. After stating the purpose to effect an amicable partition of the property of the succession of Volney Metcalfe, deceased, consisting of the Rota Quinta plantation, a description of which by sections and subdivisions of sections is given, this writing proceeds:

"The following agreement or act of partition is this day made and entered into by and between Andrew W. Metcalfe, here present and acting for himself, Amelia S. Metcalfe, Volney Metcalfe, Matilda A. Metcalfe, and James A. Metcalfe, of the State of Texas, herein represented by their special agent, attorney in fact, and attorney at law, Wade R. Young, of the parish of Concordia, heirs of the deceased, and Mrs. Matilda Ann Metcalfe, of said State of Texas, herein represented by her special agent and attorney in fact and attorney at law, the said Wade R. Young, the said Mrs. M. A. Metcalfe being the widow of the deceased: 1st. That said Mrs. M. A. Metcalfe specially renounces in favor of her children herein named, the heirs of the deceased, all right, title, and interest in and to any part, parcel, or portion of said plantation, and consents that there be a partition in kind amongst the five heirs, all of age, and herein present or represented: 2d. The parties herein agree:

"First. That sections 30 and 25 be divided into five parts or portions, by lines running from the north line of said sections due south to the south boundary of the same, said parts or portions to be so laid off that each shall contain one hundred acres of clear or arable land, more or less, as may result from the division of the whole number of acres of arable into five parts, said parts or portions to begin at the north-east corner of section 30, and to be numbered from right to left, 1, 2, 3, 4, 5.

"Second. That all the swamp or wild lands of said plantation lying south of said sections 30 and 25 shall be annexed to and form part of lot 1.

"Third. That the west half of the northwest quarter, and the west half of the southwest quarter of section 9 shall be annexed to and form part of lot No. 2.

"Fourth. That section 24 shall be equally divided between lots 3, 4, 5, by lines run from the south line of said section due north, beginning at the southeast corner of said section, lot 1 of same to be annexed to lot 3, lot 2 to lot 4, and lot 3 to lot 5.

"The foregoing tracts of land having been so subdivided into five parts, it is agreed,

"1st. That Volney Metcalfe shall take lot 1.

"2d. That James A. Metcalfe shall take lot No. 2.

"3d. That Andrew W. Metcalfe shall take lot No. 3, if the dwelling-house be on said lot, and if not, then that one of the heirs to whom may be assigned the lot on which said dwelling-house stands shall exchange with the said Andrew W. Metcalfe.

"4th. That Amelia S. Metcalfe shall take lot No. 4.

"5th. That Matilda A. Metcalfe shall take lot No. 5.

"6th. That the cabins or quarters, except those in the yard, shall be equally divided.

"7th. That the gin and cotton-house, with four acres of land adjacent thereto, shall remain undivided, and that the owners of each one of said lots shall have a right to use the same for the purposes for which they are intended, under the direction of Andrew W. Metcalfe, who will retain charge and control of same.

"8th. That the stable and corn-crib shall be taken down, and the lumber and material equally divided, to be used for the construction of other and smaller stables.

"And the allotments having been so made and accepted, the said Mrs. Metcalfe conveys, and the said heirs mutually convey to each other, the parts so designated, with mutual covenants of warranty, to have and to hold the same for the use of them, their heirs, and assigns.

"Done and signed at Vidalia, parish of Concordia, State of Louisiana, February 28th, 1877."

Signed by A. W. Metcalfe, and each of the other parties by Wade R. Young, attorney.

At the time of making and signing this paper, Wade R. Young had not received the powers of attorney; but he says he knew they had been executed; and they were delivered to him a few days after. There were two powers, duplicates, one by Miss Matilda A. Metcalfe, dated, Mason county, Kentucky, February 12, 1877. There is no witness to either instrument; and their respective dates are not otherwise shown than by the dates they bear.

The other power is as follows:

"State of Texas
 " Falls County } We hereby constitute and appoint, and by
 these presents do constitute and appoint, Wade R. Young, of the Parish
 of Concordia, and State of Louisiana, our special agent and attorney-in-
 fact, to represent us and our interest in the matter of the partition of
 a certain tract of land or cotton plantation, with all the buildings and
 improvements thereon and thereunto belonging, known as the Rota
 Quinta plantation, being, lying, and situate in the said parish of Concor-
 dia, and State of Louisiana, on the east bank of the Tensas river, about
 six miles below the mouth of the Little Tensas, or Bayou L'Argent, and
 about twenty-two miles from the town of Vidalia. And we specially au-
 thorize and empower the said Wade R. Young to do for us and in our
 name all acts necessary to effect a partition of said plantation among
 the several persons having undivided interests therein. And we
 hereby ratify and confirm all the acts of our attorney done in the premi-
 ses, as fully and completely as if done by ourselves present and in
 person.

"Done and signed this 15th day of February, 1877.

"(Signed)

M. A. METCALFE, Tutrix.

VALERY METCALFE.

A. S. METCALFE.

J. A. METCALFE."

Recurring now to the act of partition, it is manifest that the actual partition was not completed on the 28th February. Five lines were to be run through sections 25 and 30, not so as to divide them into five equal parts, but so as to give to each part one fifth of the whole number of acres of clear or arable land. Section 24 was to be divided into three equal parts; and then it was to be ascertained on which of the lots the dwelling-house stands. The surveyor was absent; and after his return he subdivided the land, and made a map of it, which he filed in the recorder's office. This map is dated March, 1877, without any mention of the day of the month; and there is nothing to show the precise date at which it was filed in the recorder's office. It shows that the dwelling is not on lot 3, but on lot 2; and there is no proof of any exchange between James A. Metcalfe and Andrew W. Metcalfe. The act of partition, as it is called, is nothing more than an agreement as to how the partition should be made; and before an actual partition could have been made, the formation of the lots in accordance with the agreement was indispensable.

It will be observed that Mrs. Metcalfe, who signed the power as tutrix, although her functions as such had terminated, gave no authority to her agent to renounce her rights and interest in the property. No such intention is expressed in the power; nor can it be deduced from

the power, which was copied from a form prepared by the agent, as he testified. Whatever the object may have been, whatever the effect may be, this renunciation was purely voluntary on the part of the agent; and was wholly unauthorized by the power.

It was not possible for one attorney or agent to represent five of the six proprietors in an act of partition, or in an agreement fixing the terms of the partition. A partition is an alienation, by each one of the co-proprietors, of his undivided share and interest in all the common property except that part which is allotted to him in the partition. Each one cedes, transfers, and conveys, to each and all the others, his right and interest in and to the parts and shares allotted to them, respectively, for and in consideration of the like cession, transfer, and conveyance, by each and all of them, to him, of their respective rights and interests in and to the part and share allotted to him. This operation constitutes as many distinct alienations and acquisitions, and requires as many concurring wills, as there are co-proprietors, although the whole is embodied in a single act or writing; and one person can no more represent the several co-proprietors in a partition than could one agent represent the vendor and vendee in a contract of sale.

Where a judicial partition is to be made among minors, their tutor, certainly presumed to be without prejudice or partiality, can not represent them. In such cases it is necessary to appoint a special tutor for each minor, to represent him alone. Succession of Aguillard, 13 An. 97; Hagan vs. Grimshaw, 15 An. 394. See, also, Beal vs. McKiernan, 6 La. 407.

Where the object of the partition is merely to ascertain and set apart to all the minors the entire share and portion coming to them, without assigning and allotting to each his separate share, their tutor may well act for and represent them all; but where the shares of the minors are to be partitioned, so as to allot to each his separate share, each must be represented by a tutor, for the obvious reason that the interest of each necessarily conflicts with that of each and all the others: and this is equally true in every partition in kind.

Of course, where all the co-proprietors are *sui juris* they may make a voluntary partition; but the distinct consent of each to alienate in favor of, and to acquire from each and all the others, must be given; and this can not be done by an agent representing more than one of them. As Judge Martin said in Beal vs. McKiernan, 6 La. 415:

"An agreement, *aggregatio mentium*, one person bound to another, are of the essence of every contract, and, consequently, of every sale. Where there is but one person, there can be no agreement, no obligation; for there is not the concurrence of two minds, no one person bound to another."

Metcalf vs. Alter.

The writing styled an act of partition, in this case, is a mere nullity on its face. It did not vest in any one of the co-proprietors a separate interest in the common property: it did not make any one of them the owner of any special or distinct part of the property: it is without effect or obligation as an agreement for any purpose; the property remained in its entirety, in indivision, at the time of the seizure; and the right of Alter is perfect to have the interests of all the defendants in execution, except James A. Metcalfe, in and to the undivided property, the Rota Quinta plantation, sold in satisfaction of his judgment, subject to the right of James A. Metcalfe, and the purchaser at that sale, to have their respective shares and portions ascertained and set apart by partition.

Where all the owners, or part of them, holding in indivision, unite in a mortgage of the common property, a voluntary partition can not impair the rights of the mortgagee. If, therefore, there had been a complete and valid partition in this case, it would not have prevented the seizure and sale of the rights and interests of all the mortgagors in and to the entire Rota Quinta plantation, under the mortgage and judgment in favor of Alter. See *Erwin vs. Orillion*, 6 La. 214.

We can not correct the slight error of the district judge, in favor of appellant, because the appellee has not asked for an amendment; and we do not think this a proper case for the infliction of damages as for a frivolous appeal.

The judgment appealed from is therefore affirmed at the costs of appellant.

Mr. Justice SPENCER being recused takes no part in this decision.

No. 7183.

MRS. ESTHER CHAPMAN, EXECUTRIX, VS. CITIZENS' BANK OF LOUISIANA.

As against the purchaser of mortgaged property sold by an assignee in bankruptcy, the hypothecary action of the mortgage creditor is prescribed by the lapse of ten years from the purchase of the property from the assignee.

A judgment will be prescribed by the lapse of ten years from its date unless revived.

The judicial mortgage arising in virtue of a judgment, and the hypothecary action authorized by the mortgage both perish by the prescription of the judgment. Service of citation in the hypothecary action will not interrupt prescription of the judgment.

A PPEAL from the Fourth District Court, parish of Orleans. *Houston*, J.

Geo. L. Bright and Barrow & Pope for plaintiff and appellee.

Armand Pilot and B. F. Jonas for defendant and appellant.

The opinion of the court was delivered by

MARR, J. This is an hypothecary action, by which plaintiff seeks to

enforce against the Citizens' Bank, third possessor, the judicial mortgage resulting from the recording of the judgment which she obtained on the 25th March, signed on the 29th March, 1867, in the Third District Court of New Orleans, against Stephen O. Nelson.

The Bank acquired the property against which plaintiff proceeds by sale made on the 18th July, 1868, by the assignee of Nelson, bankrupt, by order of the court in bankruptcy; which sale was afterwards confirmed by the court.

The hypothecary action is prescribed by the lapse of ten years from the date at which it accrued. This action accrued against the Bank, if it ever existed, at the date of the acquisition of the property by the Bank. R. C. C. 3528, 3529; *Lanusse vs. Minturn*, 11 La. 259, 260.

In *Chapman vs. Nelson* and others, just decided, we reversed the judgment of the Fourth District Court in the suit to revive the judgment set up and relied upon in this case; and that judgment not having been revived in the manner provided by law, before the lapse of ten years from the time it was rendered, is now prescribed, and was prescribed on the 30th March, 1877. Act of 1853, R. C. C. art. 3547.

This hypothecary action was brought on the 16th March, 1877, in the same court, on the same day on which the suit to revive the judgment was brought; and in the petition it is alleged that the judgment was duly revived by the citation. This is a mistake in point of fact; the judgment has not been revived.

The mortgage, whether conventional or judicial, is but an accessory right, which can not exist without the principal right or obligation which it secures; and it is elementary in our law that the mortgage falls with the principal obligation to which it is accessory. R. C. C. 3285; *Calderwood vs. Jacobs*, 4 An. 509; *Le Beau vs. Glaze*, 8 An., and authorities cited p. 477; *Troplong Prescription*, 2, No. 659; *Troplong, Hypothèques*, 4, 878 bis.

The accessory, the judicial mortgage, was not prescribed, and the hypothecary action was not prescribed, at the time this suit was brought; but the judgment, on which alone the hypothecary rights of plaintiff depended, was rapidly approaching its extinction; and it perished at the end of the ten years from the 29th March, 1867, the date at which it was signed and became final. Citation in a suit to revive the judgment would not have interrupted the prescription of the hypothecary action; nor did the citation in the hypothecary action interrupt the prescription of the judgment.

"L'interruption de la prescription de l'hypothèque n'interrompt pas la prescription de l'action personnelle." *Troplong, Hypothèques*, 4, 878 bis.

"Lorsque l'immeuble hypothéqué est passé dans les mains d'un

tiers détenteur, les actes d'interruption de l'action personnelle contre le débiteur n'interrompent pas la prescription à l'égard du tiers détenteur; réciproquement, l'interruption de l'action hypothécaire n'interrompt pas la prescription de l'action principale." Troplong, Prescription, 2, No. 659.

When the judgment was prescribed the judicial mortgage ceased to exist; and by the peremption of the judgment and the judicial mortgage the hypothecary action was extinguished.

"Si la prescription a éteint l'obligation personnelle et l'action qui en déroule, l'action hypothécaire sera éteinte par contre-coup. L'hypothèque étant l'accessoire de l'obligation personnelle, doit nécessairement tomber avec celle-ci. * * * Il faudrait se tenir à cette décision, quand même l'on aurait conservé par des actes interruptifs l'action hypothécaire." Troplong, Hypothèques, 4, 878 bis.

An ordinary action will not be affected by the lapse of time while it is pending; but if, during the pendency of the suit, the right asserted and sought to be enforced should be extinguished, the action could no longer be maintained.

We do not think it necessary to consider the other questions raised in this case, and discussed with so much earnestness and research by the learned counsel, because the right of action no longer exists.

The judgment of the district court was in favor of plaintiff; and it is erroneous.

It is therefore ordered, adjudged, and decreed that the judgment of the district court appealed from be annulled, avoided, and reversed; that the petition and demand of plaintiff be rejected and dismissed; and that plaintiff, appellee, pay the costs in this court and in the district court.

CONCURRING OPINION.

SPENCER, J. I concur in the decree in this cause. The suit to revive was not brought in the court that rendered the judgment, nor in a court to which had been transferred that jurisdiction.

In my opinion, under the articles 2278 and 3547 of the Revised Civil Code, the prescription of a judgment, that is, of the judicial fiat making a debt executory, can only be interrupted or prevented by a suit to revive in the same court that rendered it, or by a written acknowledgment signed by the debtor or his agent. Suit in any other court might keep alive the debt evidenced by that judgment, but the judgment itself, the judicial recognition which had made that debt executory, would become inoperative and ineffective, unless the court which gave it renewed or revived it. The judicial mortgage being a mere consequence of the judg-

Chapman, Executrix, vs. Citizens' Bank of Louisiana.

ment, necessarily perishes with the judgment. If the creditor be permitted, without objection, to obtain another judgment for *the same debt in another tribunal*, it will be a new and different judgment, and not a continuation of the old one, and will carry with it none of the consequences or accessories of the old one.

Rehearing refused.

No. 7311.

THE STATE VS. WILLIAM VANCE.

The term of a criminal court does not lapse on account of setting aside a first *venire*, and ordering the drawing of a second one, when the court remains in session until the second *venire* is drawn, transacting such business as does not require a jury.

Section eleven of the act No. 44 of the year 1877 which requires all objections to the manner of drawing *venires* to be made on the first day of the term of court, does not apply to juries drawn after the first day of the term, or to persons indicted during the term for an offense committed after the first day of the term.

The clerk of the court can not legally act as a jury commissioner until he has taken the required oath as such; and any *venire* he is actively instrumental in drawing before taking that oath, must be set aside.

A PPEAL from the Seventh Judicial District Court, parish of Pointe Coupée. *Yoist, J.*

H. N. Ogden, Attorney General, for the State.

A. D. M. Haralson, Chas. DuRoy for defendant and appellant.

The opinion of the court was delivered by

MARR, J. The accused was convicted of murder; and he appealed from the judgment sentencing him to death.

The homicide took place on the twelfth; the indictment was found on the sixteenth; copy was served on the accused in person on the nineteenth; and he was put upon his trial on the twenty-first December, 1878.

The regular term of the district court for the parish of Pointe Coupée commenced on Monday, December 2, 1878. On the first day of the term the entire *venire* was set aside on motion, on the ground that the clerk of the court was not sworn as a commissioner at the time of the drawing of the jury; and the court ordered the jury commissioners forthwith to draw fifty jurors for the week commencing on the ninth; thirty for the week commencing on the sixteenth; and fifteen for the week commencing on the twenty-third December. The names of the jurors first drawn, the *venire* that had been set aside, were returned to the *venire* box; and the new *venire* was drawn from that box.

From the fifty names drawn for the week commencing on the ninth

December, the grand jurors were selected; and they found the bill against the accused.

On the eighteenth December the accused by his counsel formally objected to being required to plead to the indictment, and to the fixing of the case for trial on the ground that the term had lapsed by reason of the setting aside of the first *venire*. It seems the court continued in session, transacting such business as did not require a jury. We think this was proper, and that the term had not lapsed.

This objection having been overruled, the accused on the same day presented his exceptions and objection to the grand and petit jurors and moved that the *venire* be quashed, on the ground that it was illegal and drawn without warrant of law, and summoned without authority of law; and that it was not empaneled on the first day of the term of the court.

That the general *venire* list from which the jury was drawn was made by Hebert, a clerk of the court and a jury commissioner, prior to his having taken the oath required by law as jury commissioner. The court refused to allow the exceptions and motion to be filed because they were not made on the first day of the term, as the bill of exceptions states.

Section 11 of the act No. 44, of 1877, regular session, the present jury law, does require exceptions to the array or *venire* to be made on the first day of the term; but obviously this must be understood with certain restrictions. No objection could be made to the *venire* before it was drawn; nor could a person indicted for an offense committed during the term and put upon his trial at the same term have objected to the *venire* on the first day of the term.

The *venire* objected to in this case was not drawn until after the first day of the term; and it was summoned for the second week, the ninth December. If that could be considered the first day of the term, the accused had no occasion, no right, to appear in court to challenge the *venire* until the indictment was found against him, which was on the sixteenth, the third week of the term, the second week of the jury term. Two days after the indictment was found, and the day before the copy was served on him, he presented in due form his exceptions and objection to the *venire*. We think that section 11 of the act of 1877 must be held not to apply to juries drawn after the first day of the term; nor to persons who had no interest and no right to object to the *venire* until after the juries had been empaneled. It would be to the last degree unjust to apply it to a person who is indicted during the term for an offense committed after the first day of the term, and who is put upon his trial at the same term.

The clerk, as one of the jury commissioners, had taken an active

part in the selection of the three hundred names to be put in the *venire* box and in the selection from time to time of other names to supplement the list and keep up the requisite number, three hundred. This is a far more important duty than that of merely drawing from the *venire* box the slips of paper on which the names are written. Confessedly, Hebert was not qualified as jury commissioner when this most important duty was performed. When the first *venire* was set aside Hebert took the oath as required ; and then, assisted by two other jury commissioners, he drew the *venire* from the box after returning to it the names of the first *venire*.

The words of the statute, section 3, act of 1877, are: "Before entering upon the discharge of their duty each member of the commission shall take an oath faithfully to discharge the duties imposed upon them by this act" The oath taken by Hebert on the third December, 1878, made him, for the first time, a qualified jury commissioner. That oath necessarily had reference and was limited to his future acts as such commissioner ; and it could not validate that most important previous duty, the selection of the names to be put in the *venire* box.

The necessity for taking this oath was fully and carefully considered in *State vs. Williams*, 30 An. 1028 ; and we decided that the clerk was not qualified to act as a jury commissioner until he had taken the specific oath prescribed by the statute. In this case, as we said in that case, p. 1031, "the selection of the jurors was not legal ; and the inevitable result of that illegal selection was to affect the composition of the grand and petit juries, the validity of the indictment, the verdict and sentence."

It is therefore ordered, adjudged, and decreed that the verdict rendered in this case be set aside ; that the judgment and sentence be avoided and annulled ; that the indictment be quashed ; and that the accused, William Vance, be detained in custody to await the further action of the district attorney and the grand jury of the parish of Pointe Coupée, and until discharged in due course of law.

CONCURRING OPINION.

MANNING, C. J. I did not assent to the ruling in *Williams' case*, 30 Annual, 1028, touching the need of the clerk's taking the oath of jury commissioner, because I thought that in placing him upon that commission, the statute was designating him, not as an individual, but an already sworn officer, to perform that duty, and no additional oath was necessary to qualify him. But the conduct of the lower courts is now regulated by that decision, and to avoid uncertainty and change, I think it should be adhered to.

Noland, Executrix, vs. Wayne.

No. 5946.

HENRIETTA S. NOLAND, EXECUTRIX, vs. CLIFFORD G. WAYNE.

The publication of the notices required by the bankrupt law of the United States on the part of the bankrupt, will, in the absence of fraudulent omission of the name of a creditor from his schedule, bar any claim of that creditor provable under the bankrupt act.

Where the liability of a surety on a sequestration bond is fixed by a judgment at the date of the principal's adjudication in bankruptcy, the claim of the surety against the principal is provable under the bankrupt act, and hence is extinguished by the principal's discharge in bankruptcy; even though it appear that at the time of the adjudication in bankruptcy, the surety had paid nothing on account of his liability.

A PPEAL from the Fourth District Court, parish of Orleans. *Lynch, J.*

M. M. Cohen for plaintiff and appellee.

Kennard, Howe & Prentiss for defendant and appellant.

The opinion of the court was delivered by

WHITE, J. In suit No. 17,720 of the docket of the Fourth District Court, entitled *Peter Markey vs. Cris Meyers & C. G. Wayne*, a writ of sequestration issued, and the sheriff thereunder took into his possession one hundred and twenty-four thousand shingles, more or less. On the 5th of October, 1866, Wayne bonded the sequestered shingles, giving bond in the sum of twelve hundred dollars, with Frank W. Seymour as security. On the 17th November, 1868, judgment was rendered against Wayne, condemning him to restore the property bonded, or pay in default the sum of seven hundred and forty-four dollars, with legal interest from judicial demand until paid. On the 15th March, 1869, *fi. fa.* issued under this judgment and was duly returned on April 7th, 1869, no property found. On the 19th May, 1870, in suit of *Peter Markey vs. Frank W. Seymour*, he was condemned to pay the sum of seven hundred and forty-four dollars, with legal interest from October 4th, 1866, till paid, with costs of the original suit, in which the forthcoming bond had been given. Seymour appealed from this judgment, which was affirmed by this court, with fifty dollars damages for frivolous appeal, on the 19th January, 1874. On 10th February, 1874, Seymour, through his legal representatives, paid the amount of the judgment rendered against him as security on the forthcoming bond. In the period intervening between the rendition of the judgment in the lower court against Seymour, the security, Wayne, the principal, on the 11th January, 1872, was adjudicated a bankrupt, and on the 7th May, 1872, finally discharged. The present suit is an effort on the part of the executrix of Seymour's succession to recover from Wayne the amount paid as surety. Wayne pleads as a bar his adjudication and discharge in bankruptcy; the lower court gave plaintiff a judgment; defendant appeals.

Noland, Executrix, vs. Wayne.

That the defendant was duly adjudged a bankrupt and finally discharged, before the present suit was filed, is beyond question.

It is contended that the discharge does not bar the present claim:

First—Because it was not placed by Wayne on his schedule, and consequently made the bankruptcy proceedings *res inter alios*.

Second—Because at the date of the adjudication and discharge of Wayne, this court had not finally passed on the surety's liability, hence the claim of the surety, which it is said only resulted from the payment and consequent subrogation, was not provable at the date of the adjudication or discharge.

We think neither of these propositions tenable.

1. The claim was put on the schedule, which contained the following:

Name of Creditor.	Residence and Occupation	Amount.	When and where contracted.	Nature, etc.
* * * Peter Markey. * *	* * * Lumber Dealer in New Orleans * *	* * * \$744 and \$70 costs of court and legal interest from Oct 14, 1866. * *	* * * Contracted in the city of New Orleans, La., Nov. 23, 1868. * *	* * * Judgment on open account in the 4th District Court in the City of New Orleans in case 17,720 of the docket of the court. * *

Thus the very claim due by Wayne to Markey, and for which plaintiff was surety, was explicitly and fully described in the schedule. The debt due by Wayne to Markey was the debt for which Seymour was liable as security, and to which he would have been by operation of law subrogated. We consider, however, the provability of the debt the crucial test.

The provision of the bankrupt act makes the discharge operative against all debts which "were or might have been" proved against the bankrupt's estate. The language of the law is: "A discharge in bankruptcy duly granted, shall, subject to the limitations imposed in the two preceding sections, release the bankrupt from all debts, claims, liabilities, and demands, which were or might have been proved against his estate in bankruptcy." * * * U. S. Rev. Stat. 5119. Even if putting the claim on the schedule in the manner stated, did not amount to a placing thereon that of plaintiff, publication of the required notices, in the absence of fraudulent omission of the name of the creditor, will bar the claim of the creditor whose name has been omitted. Bump's Bankruptcy, 8th edition, p. 730, and authorities there cited.

2. The liability of Seymour was fixed by judgment at the date of the adjudication in bankruptcy. He could at that time and before payment have sued the principal on the bond. A surety may even before making any payment bring suit against the debtor, to be indemnified by him, first, when there exists a lawsuit against him for payment; second,

when the debtor has become a bankrupt or is in a state of insolvency. C. C. 3057. At the date of the adjudication in bankruptcy the surety, irrespective of payment, had a subsisting cause of action given him by law, as taught by an unbroken current from the Roman law to the writers on the Code Napoleon, to enable the surety to protect himself in advance of payment, the right being, as stated by Justinian, founded on the equitable maxim, *Melius est intacta jura servari quam post causam vulneratum remedium quærere*. L. 5 b. In quib. causis. Pothier du Cautionnement no. 441. Code Nap. 2032. Paul Post des Petits Contrats, vol. 2, p. 146. Troplong du Cautionnement, p. 343.

We can not, then, when the liability of the surety was actually determined by judgment, at the date of the bankruptcy, say that the mere non-payment by the surety, although he had before payment a cause of action, rendered his claim not exigible from the bankrupt's estate. Apart, however, from the rights of the surety as defined in our law, we think that the bankrupt act itself provided ample means for proving claims like the present before *payment*. Under the act of 1841, not so comprehensive in this regard as the act of 1867, the right to prove a contingent liability was it seems by the greater weight of authority determined. *Mace vs. Wells*, 7 Howard 272; *Crafts vs. Mott*, 4 Comstock (N. Y.) 603; *Morse vs. Hovey*, 1 Sandford, Ch. (N. Y.) 187; *Kyle vs. Bostwick*, 10 Ala. 589; *Fulwood vs. Bushfield*, 14 Pa. St. 90; *Tubbs vs. Williams*, 9 Iredell, Law, (N. C.); *Shelton vs. Pease*, 10 Mo. 473; *Jamison vs. Blower*, 5 Barb. 686; *Butcher vs. Forman*, 6 Hill (N. Y.) 584.

The provisions of the act of 1867 seem to have been in terms intended to cover a case like the present. The language is:

"In all cases of contingent debts and contingent liabilities, contracted by the bankrupt, and not herein otherwise provided for, the creditor may make claim therefor, and have his claim allowed, with the right to share in the dividends, if the contingency happens before the order for the final dividend; or he may at any time apply to the court to have the present value of the debt or liability ascertained and liquidated, which shall then be done in such manner as the court shall order; and he shall be allowed to prove for the amount so ascertained." U. S. Rev. Stat. 5068.

"SEC. 5070. Any person liable as bail, *surety*, guarantor, or otherwise for the bankrupt, who shall have paid the debt, or any part thereof, in discharge of the whole, shall be entitled to prove such debt, or to stand in the place of the creditor, if the creditor has proved the same; *although such payments shall have been made after the proceedings in bankruptcy were commenced*; and any person so liable for the bankrupt, and who has not paid the whole of such debt, but is still liable for the same, or any part thereof, may, if the creditor fails or omits to pay

 Noland, Executrix, vs. Wayne.

such debt, prove the same either in the name of the creditor, or otherwise, as may be provided by the general orders; and subject to such regulations and limitations as may be established by such general orders."

Under these sections, in *Lipscomb vs. Grace*, 26 Ark. 231, it was held "that it is competent for a surety before he has made payment to prove up his contingent liability on an application for discharge in bankruptcy; and if he does not so prove up he is barred by the certificate of discharge from further proceeding against the bankrupt." The same conclusion was arrived at by the Supreme Court of Rhode Island in *Fisher vs. Tift*, 12 R. I.

We conclude, then, that the claim was provable, and is hence barred by the discharge, and that therefore there is error in the judgment below; and it is consequently reversed, and judgment be and the same is hereby rendered in favor of defendant and against the plaintiff, rejecting plaintiff's demand, with costs in both courts.

Mr. Justice MARR takes no part in this decision, having been of counsel.

 No. 5871.

DARCY & WHEELER VS. J. S. LABENNES AND WIFE.

The action of a husband's creditor to annul a judgment of separation of property obtained by the wife, on the ground of its being in fraud of the husband's creditors, is only prescribed by one year from the date of the judgment of the creditor against the husband.

The record of the wife's suit for a separation of property may be introduced in evidence in the suit subsequently brought by the husband's creditor to annul the judgment of separation merely to show that such a judgment was rendered, but the parol evidence on which the judgment was obtained is not admissible in the suit to annul. The burden of proof in such a suit is on the wife, to prove *aliunde*, that her judgment was fairly obtained.

Where it does not appear by an authentic act that the wife's rights and claims under her judgment of separation of property have been paid, and where the evidence shows that the first writ of *fi. fa.* in execution of her judgment was issued four years after the judgment was rendered, the judgment will, on proper application, be set aside as null and void.

A PPEAL from the Fifth District Court, parish of Orleans. *Cullom, J.*

Charles Louque for plaintiffs and appellants.

Defendant unrepresented.

The opinion of the court was delivered by

MANNING, C. J. The plaintiffs obtained judgment against J. S. Labennes in February 1874 for merchandise sold to him in February 1867. In November of this last year, Mrs. Labennes had instituted suit against

her husband for a separation of property, and had judgment therefor in the following month. When Darcy & Wheeler issued execution on their judgment against Mr. Labennes, they were confronted by this judgment of separation, and immediately brought this suit to annul it.

The prescription of one year is pleaded, along with a general denial. This suit was commenced Feb. 25, 1874, a few days after the plaintiffs' judgment against Labennes was obtained, and therefore the prescription pleaded is not good. Civil Code, art. 1989 new no. 1994. Van Wickle v. Garrett, 14 Annual, 106. Powell v. O'Neil, 24 Annual, 522. The text of the Opinion in the 14th Annual must be consulted, as the digest of it by the Reporter is erroneous.

The judgment of separation is attacked for fraud, as having been obtained expressly to defeat the plaintiffs' claim; and because the wife did not bring into the marriage any money or property as falsely alleged; and the husband's affairs were not in disorder; and he was not in a condition of insolvency; and the judgment was by consent; and had never been executed.

The record of Mrs. Labennes' suit was offered in evidence, which contains the testimony therein. The plaintiffs opposed the reception of the evidence in that suit as testimony in this. No other testimony was offered by the defendants.

A record may be introduced in evidence to shew that a judgment was rendered, or for other purposes, but it does not follow that the parole testimony upon which it was obtained can be admitted as proof in another suit, simply because it forms part of the record. If such evidence is admissible in this other suit, it is so on other grounds than that it is a part of the record offered, and independent of that fact. Baptiste v. Soulie, 13 La. 268. Florance v. Bachemin, 3 Annual, 174. Erwin v. Banks, 6 Annual, 1.

All transactions between the husband and the wife relative to the property of the former must be regarded with suspicion, when the object of such transactions is to create a preference over other creditors in favour of the wife, and when such preference comes in competition with the actual claims of such other creditors. In such cases, when these transactions are attacked for fraud and collusion, it is incumbent on the wife to shew the truth and genuineness of the claim upon which her judgment against her husband is founded. The burthen of proof is upon her to shew that her judgment was fairly obtained. Deblanc v. Deblanc, 4 La. 19. Malone v. Kitching, 10 Annual, 85. Phelps v. Rightor, 15 Annual, 33. She has neither done that, nor attempted to do it in the present case.

The judgment of separation must be executed on pain of nullity, and this execution must be by the payment of the rights and claims of

Darcy & Wheeler vs. Labennes and Wife.

the wife, evidenced by an authentic Act, or an uninterrupted suit to obtain payment. *Bostwick v. Gasquet*, XI Annual, 534. The judgment of Mrs. Labennes against her husband was obtained Dec. 7, 1867. There was no payment through a notarial act. A writ of *fiery facias* issued January 25, 1872, and was returned *nulla bona* April 4th. following. An interval of four years between the judgment and the first attempt to execute it is not the uninterrupted suit to obtain payment contemplated by the Code.

It is ordered and decreed that the judgment of the lower court is avoided and reversed, and that there be now judgment in favour of the plaintiffs, annulling the judgment of Françoise F. Labennes against Joseph S. Labennes, her husband, signed Dec. 7, 1867, and that the plaintiffs recover of the defendants the costs of both courts.

No. 7305.

THE STATE VS. RALPH SMITH.

Where the record in a case where the defendant was prosecuted for murder fails to show that the prisoner was present at any time during the trial, the verdict in the case will be set aside, and the judgment annulled.

An amendment of the minutes of the criminal court in any particular case, in order to show that the defendant was actually in court during the trial, may be made even after the record of appeal has been lodged in this court, provided the amendment is made contradictorily with the defendant. But it can not be made *ex parte*, with no notice to the defendant.

The jury commissioners have no authority to draw a grand jury at any period less than fifty days before the regular time for the opening of the court term.

After the judge has annulled and set aside, in one case, a whole *venire* drawn for that term, he can not afterward during that term in another case, hold such a *venire* to be good.

APPEAL from the Thirteenth Judicial District Court, parish of East Carroll. *Hugh, J.*

H. N. Ogden, Attorney General, submitted the case on behalf of the State.

J. M. Kennedy for defendant.

The opinion of the court was delivered by

MANNING, C. J. The defendant, convicted of murder and sentenced to death, appeals, and prays a reversal of the judgment on sundry grounds which are set forth in his bills of exception, motions for continuance and for a new trial, and assignment of errors. We regret that, in the examination of these numerous questions in this and the *Revells* case, we have been unassisted by brief or oral argument on the part of the State.

This record, like that of Revells' case, contains no mention of the prisoner's presence in court at any time during the trial, and of course none of any arraignment. The requirement of these things, and of their mention in the record, is not new.

It has ever been held, in trials for felonies, that the prisoner must be present at every important or vital stage of the proceedings. 3 Wharton Crim. Law §2991, 1 Bishop Crim. Proc. §273, and that the record must shew his presence, 3 Whart. Crim. Law §2999. When he can waive his presence, and when he need not be present without waiver, have been pointed out. *Ibid.* §2992-3000. The indispensability of arraignment, of the record shewing it, in felonies, and in what classes of cases it can be waived has long been familiar law. *Ibid.* §3153 *et seq.* Yet we have had occasion several times recently to set aside verdicts and annul judgments for errors in these matters.

The minutes were corrected in the same way as in *State v. Revells*, just decided, and the ruling there applies here. *ante* 387.

The prisoner moved to quash the indictment for irregularities in forming the venire from which the Grand Jury was drawn. The commissioners had drawn the jury on May 2d. The court met on June 3d, and this indictment was found and presented in open court on the 10th. of same month, and the motion to quash was made on the 11th. There are two grounds;—1. That the jury was not drawn within the time directed by the statute; 2. that the same venire had already been quashed on June 4th., at the instance of other parties indicted at the same time.

1. The statute requires the jury shall be drawn in not less than fifty days prior to the meeting of the court. Sess. Acts 1877, p. 56. This jury was drawn thirty-two days before the court met. If the jury commission can abridge the statute time at all, it can abridge it to as short a time as may suit the convenience or caprice of its members. It cannot abridge the time at all. More than fifty days may elapse between the drawing of the jury and the regular time for the opening of the term, but not less.

2. It appears that a motion to set aside this venire was made in another case, and sustained, and such being the case, we are unable to conceive a good reason why the prosecuting officer persisted in proceeding with the trial, or how, after the judge had annulled and set aside the whole venire drawn for that term he could hold it good for any case.

There are numerous other causes of error set forth, which we will not examine, because it is needless. The record teems with objections—bristles with points—made with indefatigable zeal and pertinacity by the defendant's counsel; and when it is remembered that the trial was for the gravest of crimes, to be legally expiated by the gravest of penalties, we cannot forbear the admonition that neither the law nor the public

 State vs. Smith.

weal require that any man shall suffer even for crime, save according to those forms, and with due observance of those safeguards against error, which the wisdom of the learned, and the experience of many years and many countries, have found fitting and necessary to prescribe for the conduct of criminal trials.

It is ordered, adjudged, and decreed that the verdict of the jury is set aside, and the judgment of the lower court is avoided and reversed, and the indictment herein be quashed, and that the defendant be held in custody to await a new indictment, and for trial under the same.

 No. 7442.

THE STATE VS. JAMES A. FINN.

The continuance of a case on the ground of the absence of a material witness is a matter in the sound discretion of the court, and the exercise of that discretion will not be interfered with when there is nothing to show it was unsound. Where an accused is on trial under an information for shooting with a dangerous weapon, to wit with a *pistol*, the information may be amended by substituting the word "gun" for the word "pistol."

The fact that while the jury in a criminal case were deliberating they informed the deputy sheriff in charge that they desired further instructions from the judge, his reply that the district attorney was absent and no further instructions could be had until his return, the consequent finding of the jury without any further instructions will not justify the granting of a new trial, when it appears that the judge as well as the district attorney was absent, when the jury's request for further instructions was made, and that the jury did not repeat the request.

APPPEAL from the Superior Criminal Court, parish of Orleans. *Whitaker, J.*

H. N. Ogden, Attorney General, for the State.

John N. Healey for defendant and appellant.

The opinion of the court was delivered by

WHITE, J. The defendant having been informed against for shooting with a dangerous weapon with intent to commit murder, convicted, and sentenced to ten years hard labor in the Penitentiary, appeals. Before going to trial he asked a continuance on the ground of the absence of witnesses material to his defense, which was refused. The matter was within the sound discretion of the lower court, and there is nothing in the motion itself or in the record showing that the limits of sound discretion were transcended. The information charged that the accused "with a certain dangerous weapon, to wit, a pistol, did shoot one W. N. Rogers with the intent of so doing, feloniously, wilfully, and of his malice aforethought, to commit murder, contrary," etc. After the commencement of the trial, the jury having been impaneled, two

State vs. Finn.

witnesses for the State having been heard, the testimony developing that a gun and not a pistol was the weapon with which the shooting was done, the State asked to be allowed to amend the information by substituting the word gun for pistol. The court allowed the amendment, and the trial proceeded. The court did not err. R. S. 1047. While the jury were deliberating, the court having taken a recess, they informed the deputy sheriff that they desired further instructions, to which he replied that the prosecuting attorney being absent, no further instructions could be given until his return. This was made the basis of an application for a new trial, which was refused, the court giving as reasons therefor that both the judge and district attorney were absent when the request was made; that had he been present he would have instructed the jury to await the return of the district attorney; that the jury did not repeat their request, which they had full opportunity to do. We can not say under this state of facts that the new trial was improperly refused.

Judgment affirmed.

No. 7177.

SUCCESSION OF HENRY TABARY.

One who opposes every item of an administrator's account can not be said to ratify a certain adjudication of property the proceeds of which are sought to be distributed by the account.

Property of a succession sold for cash in order to pay the debts of the succession must, at its first offering, bring its full appraised value. If thus sold for less than its appraised value, the sale will be invalid.

Where property subject to a certain mortgage is passed by a simulated transfer to a nominal buyer, who formally recognizes the mortgage in the transfer, the widow and administratrix of the owner, who joined her husband in the simulated transfer, can not afterward have the property sold as a part of her husband's succession to the prejudice of the mortgage creditor. Such an adjudication is absolutely null and may be attacked collaterally.

Private counter-letters have no effect as against creditors.

A PPEAL from the Second District Court, parish of Orleans. *Tissot, J.*

Louque & Fernandez for administratrix and appellee.

A. Robert for opponent and appellant.

The opinion of the court on the original hearing was delivered by **DEBLANC, J.**, and on the rehearing by **SPENCER, J.**

DEBLANC, J. John Carran is the holder of a note drawn on the 10th of May 1870, by L. H. Tabary, to his own order, by him endorsed, and secured by a conventional mortgage, which he—Tabary—gave on a

piece of property situated in this City, and which he afterwards sold to Aymes—his son-in-law—for fifteen hundred dollars. In settlement of that price and according to the recitals in the act of sale, Aymes paid in cash the sum of three hundred dollars, and assumed the payment of the note held by Carran, which—from the date of that assumption—was secured by the original mortgage granted by Tabary and by the privilege which resulted from said sale.

In a suit brought by one McNeil to annul the sale from Tabary to his son-in-law, on a charge of simulation and fraud, Tabary denied that charge and asserted the reality of the assailed transfer. He died, and we are informed by his widow's counsel that—not wishing to keep in his name the property thus apparently sold, Aymes signed what he calls a counter-letter and had it recorded in the Conveyance office. That instrument is in these terms: "Know ye that I formally declare that the sale made to me by Henry Tabary, of New Orleans, on the 2d of December, 1875 * * is a meresimulation, and that no consideration was ever paid to said Tabary for said sale." As soon as that declaration had been recorded, Mrs. Tabary as administratrix of her husband's succession applied for an order to sell the property, which—in court—Tabary declared had passed from him to his son-in-law, and for a real consideration, and which—now and in a private instrument—the son-in-law formally declares has never ceased to belong to his vendor.

The order to sell was first allowed and then rescinded by the district judge. The widow appealed from the decree rescinding that order, and—*considering the character of the pleadings*—we were compelled to reverse that decree. The intended sale was proceeded with, and said property, which was appraised at one thousand dollars, was adjudicated to Mrs. Tabary, a party to the sale from her husband to Aymes, for six hundred and seventy-five dollars. This took place on the 30th of June 1877, and—on the 13th of July—she filed—in the second district court—a tableau of the distribution which she proposes to make of the proceeds of that sale. In that tableau, she has allowed to herself—for a balance alleged to be due on the widow's homestead—three hundred and twenty-eight dollars, and to John Carran, on his note, one hundred and thirty-one dollars. The remaining portion of the price of the adjudication is applied to the payment of costs and fees.

This account is opposed by John Carran. Mrs. Tabary's counsel insists that he has—by the terms of his opposition—ratified the adjudication of the 30th of June. This is certainly a mistake: he does not claim the proceeds, or any share of the proceeds of that attempted sale: he contests its validity, denies its existence, and—apprehending the effects of the homologation of said account, he appeared in court for the sole purpose of disputing every item therein included; and—to use

Succession of Tabary.

his own words—prayed that it be stricken from the record of the succession. Far from ratifying any sale, his manifest intention was to guard against and prevent that which, otherwise, might have been construed, and—in all probability—invoked as a tacit ratification on his part, that which he justly considered as an additional step taken to defeat the enforcement of his claim.

In his opposition, Carran contends that Mrs. Tabary owned—at the death of her husband—property worth fifteen hundred dollars; that—besides—she has received in rents and from the company in which her husband's life is assured, more than three hundred dollars, and—for these reasons—has no right to any allowance as a homestead.

The grounds of nullity which he urges against the adjudication of the 30th of June, are:

1. That the property sought to be sold did not belong to the succession of Tabary, but to Aymes, who assumed the payment of his—Carran's—claim; and

2. That, if it did belong to said succession, it could not legally have been, as it was, adjudicated for less than its appraised value.

The property alluded to was appraised at one thousand dollars, and—at the first offering—adjudicated to Mrs. Tabary for six hundred and seventy-five dollars. Does that adjudication constitute a valid sale? In the exhaustive opinion which precedes the decree rendered by our learned brother of the district court, he says—and, in this, he is right—that administrators of successions have the same powers and are subject to the same duties and responsibilities as the curators of vacant estates. R. C. C. 1049 (1042). He, then, refers to article 1167 (1159), which provides—as to the sale of property belonging to vacant estates—“that it shall be made at public auction, to the last and highest bidder,” and justly remarks that the law—he doubtless meant that which he cited—is silent as to whether property thus sold shall or shall not bring its appraised value.

Further on he says: “the debts of the succession must be paid, and—to pay them—the property of the succession must be sold without regard to the appraisal, and sales made under the decree of a court can not be rescinded for lesion beyond moiety.” R. C. C. 2594—(2572).

We are at a loss to imagine how the articles of the Code which authorize the annulling—on account of lesion—of *existing* and *admitted* sales, can have the most distant application to this case, wherein the main question to be decided, is whether—as asserted by one of the parties and denied by the other, the adjudication to Mrs. Tabary constitutes a valid sale.

“It is now settled, we are told by the district judge, that a sale of

succession property to pay debts, may be validly made for less than two thirds of its appraisalment," and—to prove his assertion—he refers to the 5th and 10th R. R. and to the 5th, 13th and 27th An. The decision in *Valdere vs. Bird*—reported in 10 R. 398—sustains his assertion. The sale referred to in 5 A. 438, was made subject to the Citizens' Bank Stock, and the claim due upon the stock to the bank, payable according to its charter. In that case, from the tenor of the opinion delivered, the court had to deal with an exception, and—for that reason—declared that the application of the 990th article of the C. P. to the property sold was impracticable. Not a line of the decision to be found at page 508 of the 5th R. treats of the question now under discussion; but—in that book, at page 100—that question is thus disposed of: "It has been urged that the ordering of the sale for cash, implies that it must be sold for what it will bring. We presume that the judge *a quo*, in ordering the sale of the mortgaged property, understood and intended that it should be made according to law. There was no necessity for inserting in the judgments the condition, *provided its appraised value be obtained*. The law itself fixes the amount which the sale must bring, when made for cash, and it is clear that the property *can not* be adjudicated for cash under its appraised value."

C. P. 990—991—992.

The district judge thinks that the decisions in 12th and 13th An. which we have adhered to, do not sustain the opinion delivered by us in *Hermann & Vignes vs. Fontellieu*. We held that—when succession property is offered for sale for cash, under an order of court, and even for the payment of debts, it must—at the first offering—bring at least its appraised value. In 12th A. the court said: the terms of sale of the property of the succession, accepted with the benefit of inventory, were for cash. The property—an immovable—*did not bring the appraisalment*. There was, therefore, no sale which the purchaser could compel the tutrix to complete, although the property was sold to pay debts. In 13th A. the question presented for solution was thus stated by counsel: "has the creditor of an estate, whose debt operates as a judicial mortgage, and is in a twelve-months bond executed by the deceased, a right to have property of the succession sold for cash at the first offering, unless it brings the amount of the appraisalment on the inventory?" The court answered in the negative.

12 A. 368. 13 A. 439. 29 A. 505.

The district judge charges that we have virtually added seven words to the 1167th article of the Civil Code, so as to make it read that the sale therein referred to shall be made at the appraised value of the property. This—on his part—is a mistake: we believe, as he does, that the article cited contains no such conditions; but we are unable to

Succession of Tabary.

agree with him as to his construction of art. 990 of the Code of Practice. That article, which relates to the sale of property belonging to a vacant estate, provides that—"on the application of *the creditors* or any creditor of said estate, it shall be the duty of the several judges of Probates, to cause * * so much of its property as is necessary to pay its debts, to be offered for sale and sold at public auction to the highest bidder for cash, if the creditors require it; and if—on thus offering said property for sale, the appraised value should not *be bid and obtained*," then and only then can it be sold on credit and *for what it will bring*. "The principles contained in that article, apply—this is expressly declared in said Code—to all successions accepted with benefit of inventory, whether the heirs are minors or of age, and to all successions administered by administrators."

C. P. 990—991—992.

We have looked in vain for any provision in our Codes, which suggests the distinction insisted upon, and which—it is conceived—exists between the sale provoked by one of the creditors and that applied for by an administrator. The district judge supposes that "when a creditor proceeds in that manner, the Legislator meant to force the adjudication up to the appraised value, in order to prevent the sacrifice of the rights of *the creditors* who take no action." That supposition is rebutted by the fact that, whether the application to sell be made by *one* of the creditors, or by *all* the creditors, the property can not be sold—at the first offering—for less than its appraised value.

The provisions of the Civil Code, which relate to the sale of the effects of successions administered by curators, far from conflicting with, justify the adjudications on which we rely:

"If, at the expiration of a year from the curator's appointment, there be immovables * * which have not been sold, the judge is bound, at the request of the curator, to order the sale of the same at public auction * * at *one and two years credit*."

C. C. 1169 (1202).

"If, at that sale, two thirds of their estimated value be not offered, the sale shall be suspended, re-advertised at *one, two and three years credit*; but *then* the property must be sold for the price offered."

C. C. 1170 (1203).

If, at two years' credit, at a sale made at the expiration of one year from the curator's appointment, and which is necessarily ordered after the sales which can be made thirty days after said appraisement—C. C. 1164 (1155) 1165 (1156)—the property can not be sold for less than the appraisement made by experts appointed and sworn for that purpose, how reasonably infer that—when sold for cash—it may be sacrificed at the first offering; and why infer at all, in presence of the articles of the

Code of Practice, which enjoin that, at that first offering, the appraised value must be *bid and obtained*?

In *Valdere vs. Bird*, the court—ignoring its own decision—5 R. 96—and without referring to a single authority—asserted “that it had been repeatedly held, that when a sale is made to pay debts, the property may be sold for less than the appraisement.” If it had, the cases in which it was so held, have not been reported. That court had previously and justly said: “the law itself fixes the amount which the sale must bring, when made for cash, and *it is clear* that the property *can not* be adjudicated for cash under its appraised value.” Whether it be correct or incorrect, the decision in *Carter vs. McManus*—15 A. 642—refers to personal and perishable property, and does not absolutely apply to this controversy. In “*Succession of Weber*”—16 A. 420—the court said: “the payment of the debts must be effected without regard to the appraisement, when the sale is ordered at the instance of the administrator; but—if ordered at the instance of the creditors—then recourse must be had to articles 990, 991 and 992 of the Code of Practice.” That distinction is not authorized by any provision of our laws.

In deference to the district judge, whose opinions have always commanded the attention of this Court, we have once more read with care, and again considered the precedents on which he relies and those to which we adhere. The beaten path which we have followed leads to, the other by the law. This—now—is our unremovable conviction.

We would not attempt the difficult task of criticising the views of the eminent jurists who composed this Court, at the dates mentioned by the district judge: but at the pages of the Code to which they refer, what do we read? That—when sold for cash—the property of *vacant* estates, of all successions *accepted with the benefit of inventory*, whether the heirs are minors or of age, and of *all successions under administration*, can not—at the first offering—be sold for less than its appraised value: that, unless that value be *bid and obtained*, the property must be re-advertised for sale, and *then* sold on credit for what it will bring. We have copied, from the Code and from decisions of those jurists, the refutation of what we consider as a mistaken interpretation.

III.

We admit that—as a general rule—a sale clothed with the judicial sanction, can not be collaterally attacked: but—here, what are the facts? Tabary sold to Aymes a lot of ground already mortgaged to secure the payment of the note held by Carran; in the act of sale, Aymes assumed the payment of that note—and to that act—Mrs. Tabary was a party; it is signed by her. After the death of Tabary, Aymes prepared and caused to be recorded a private instrument, in which he declares that the sale from Tabary to him was a mere simulation:

Succession of Tabary.

thereupon, Mrs. Tabary procured from the probate court an order to sell, as belonging to the succession of her husband, the property thus returned by Aymes, and—at that sale—purchased said property. This ill-disguised attempt to defeat an acknowledged claim, can not be sanctioned. The declaration of Aymes neither did, nor could—to the detriment of Carran—destroy the title acquired by Aymes to the lot of ground; which both he and Tabary have subjected to the payment of the note held by Carran. 11 L. 44. 5 A. 228. The sole object of that transparent declaration was to avoid the otherwise unavoidable effects of the vendor's privilege, resulting in favor of that creditor, from the sale made by Tabary to his son-in-law, and to subordinate that creditor's claim to the homestead rights of the widow.

To obtain the order under which she pretends to have acquired the title, which—at the date of and previous to her application—she knew had passed from her husband, she deceived the court by a wilful misrepresentation: that intended and practiced deception impairs—so far at least as she and Carran are concerned—the validity of the order which she then procured in utter disregard of the law, and of her own and her husband's act. Under these circumstances, she forfeited the protection invariably and justly extended to those who honestly acquire under the regular decree of a competent court; and the adjudication to her of the lot belonging to her son-in-law, is an absolute nullity, which may be urged wherein and whenever it is relied on, by any of the parties to these fraudulent proceedings, to defeat the enforcement of an obligation given, ratified or acknowledged by them.

Whatever may be—as between themselves—the legal value of the sale from Tabary to Aymes, that sale—as to Carran—is not a simulation, and why? Because Aymes, Tabary and his wife have all acknowledged, out of court and in a notarial act, in court and by placing it on the tableau filed by the latter, that the note held by Carran, which constitutes the four fifths of the consideration of said sale, was and is still due by Aymes and the succession of his father-in-law. Mrs. Tabary was a party to that sale, and—to her own knowledge—the adjudication to her of the property sold to Aymes and mortgaged to Carran, was—as to that creditor, the sale of Aymes' property and, therefore, an absolute nullity. C. C. 2452 (2427).

The declaration of Aymes, made and recorded after the death of Tabary is not a counter-letter. If it were, counter-letters can have no effect against creditors, for—as said by the Court in *Stewart vs. Newton*—"While parties to a simulated contract may be compelled, *inter se*, to treat it as a nullity on the production of such an instrument, still the law is careful to guard the interest of third parties against any injury from such a dissolution of an apparent title. Had it failed to do so,

public confidence would have been destroyed, and public ore lit analyzed. If a private counter-letter could, at any time and as to all the world, defeat the most formal title in the archives of the Recorder's office, their authentic acts would be mockeries, and registry offices pitfalls for the unwary."

R. C. C. 2239 (2236)—12 A. 622.

In the case entitled "Succession of Tabary," and reported in the 30th A. p. 188, being under the impression that Carran had excepted to the introduction of evidence, the sole object of which was to add a piece of property to the succession of his debtor, to swell instead of diminishing the means of payment of his debt, we said—that Aymes' declaration that the sale from Tabary to him was a simulation should have been secured in evidence by the lower Court. The object of that evidence is now fully declared: it is to outrank and defeat the creditor's claim. That disclosure dispels the mistaken impression which inevitably led us from an error of facts to an error of law.

Were it true—as contended by Mrs. Tabary's counsel—that the unsworn declaration of Aymes can have—as to third parties—the effect which a counter-letter has in regard to simulated contracts and as between the parties to such contracts—were it admitted that said declaration can destroy an existing title, transfer the ownership and possession of property, wipe out every right resting on that title, or subordinate them to a resuscitated title and to resuscitated rights—still, the fact remains that there was no sale from the succession of Tabary to his widow—that, as there was no sale, there are no proceeds to be distributed, and that, even if the adjudication to Mrs. Tabary for less than the appraised value of the property, could—under the peculiar and exceptional circumstances already recited—be considered but as a voidable sale, which can not be collaterally attacked, we would—nevertheless—feel constrained to delay—until our decision in another suit, tried in and submitted to this court, between the same parties and in regard to the same lot of ground—the proposed distribution of the insufficient and as yet unrealized price, a fraction of which is—on paper—tendered to the creditor; but which—due as it is by one who seems determined to defeat his claim, he might not easily realize, if he concluded to accept it. But the adjudication to Mrs. Tabary is a manifest nullity, and as she—the only party *interested in maintaining it*—is now in court, urging it against the only party *interested in opposing it*; this fruitless and expensive litigation must be closed.

It is—therefore—ordered, adjudged and decreed that the judgment appealed from is avoided and reversed.

It is further ordered, adjudged and decreed that the application filed by Mrs. Widow Henry Tabary, on the 13th of July 1877, for the

Succession of Tabary.

approval and homologation of the account presented by her as administratrix of the succession of her husband, is now dismissed at her costs in both courts.

ON APPLICATION FOR REHEARING.

SPENCER, J. The earnestness with which counsel assails the correctness of our opinion in this case, and the fact that he has misconstrued the meaning of certain expressions therein, as reflecting upon his own character and integrity, have induced us to again examine this case with care. We trust that this court has never been found lacking in courtesy to members of the bar, or going out of its way to cast imputations upon them. We do not see that our language in this case can bear such construction, and we certainly did not intend that it should in any way cast reproach upon the counsel, whose character has always been considered by us as high and most honorable. Having said this much as due to the counsel himself, as well as to ourselves, we deem it necessary to notice more particularly than we have done certain points urged against our conclusions, to which we are by no means wedded through pride of opinion. It is, instead of a mortification, a pleasure for this court, when convinced of an error to correct it.

First: There can be no doubt of the right of an administrator representing the insolvent estate of one deceased to attack his acts as fraudulent or simulated to the end that his debts may be paid. But such an action can not be maintained to defeat rights and titles acquired in good faith by third persons dealing with the party holding the fraudulent or simulated title. Fraud and simulation are causes of nullity only as between the parties to them. C. C.

We apprehend that a mortgage or deed of property made by one holding a fraudulent or simulated title thereto, in favor of an innocent third person for value can not be affected or defeated by the real owner or his creditors, whether the proof results from a counter letter, or otherwise. It would be subversive of elementary legal principles, and destructive of all certainty and security in the tenure of property, if the rights of third persons dealing *bona fide* upon the faith of public records could be thus defeated by secret agreements or private conduct, acts, or deductions of other persons.

If there was fraud and simulation between Tabary and Aymes, Caran was no party to it, and his rights can not be affected by it. If this be true, then the evidence of simulation between Tabary and Aymes was irrelevant and properly excluded, and, if admitted, could have no effect.

Second: In the case of L. H. Tabary, reported in 30 A. p. 187,

Succession of Tabary.

we said that the debt due by Tabary to Carran was not *novated* in the sale to Aymes. Counsel contends that we, therefore, decided that Carran was not a creditor of Aymes! Was it necessary that there should be a novation before Aymes could be bound? Did not Aymes expressly assume and agree to pay the debt due by Tabary to Carran? Did not this make Aymes the debtor of Carran? What matters it that Carran did not release Tabary? Had he not the right to have two debtors in place of one? And was not that the effect and the only effect of the stipulation that there should be no novation? Can not I bind myself for your debt without releasing you? What, then, becomes of the counsel's argument that because we said there was no novation, therefore, we held that Aymes was not bound for Carran's debt?

Third: Counsel cites article 1869 C. C. to the effect that "no lesion whatever, even in the case of minors, can invalidate judicial sales, etc.," as authority against our decision that succession property sold at probate sale at first offering must bring its appraisalment. We are at a loss to see what bearing that article has on this case. That article presupposes that the judicial sale has been made in the manner, and with the formalities prescribed by law. If so, then, it can not be attacked even by a minor for lesion. But the case before us is one where the formalities prescribed by law have not been fulfilled. The sale is attacked for want of compliance with them just as it could be if there had been no advertisement, or an insufficient one.

The Civil Code, articles 1860, , declares that if *any of the formalities* required by law for the sale of minors' property *have not been complied with* it is not necessary to *even allege lesion* to invalidate them. "Such contracts being void by law may be declared so * *

* * without any other proof than that of the minority of the party and the want of formality in the act." Article 337, C. C., declares that the minors' property *can not be sold* for less than the appraisalment in the inventory," and if there is no offer of that amount it must again be offered, etc., until the appraisalment is obtained, etc. Now, will the counsel maintain the proposition that the judicial sale of a minor's property for, say one fourth of its inventoried value, can not be attacked because, forsooth, the law says "judicial sales" can not be annulled for lesion? Is it not apparent that this would be confounding an action to annul *for want of formality* with an action to annul *for lesion when there is no informality*?

We repeat, therefore, that the "judicial sales referred to in article 1869, as inattackable for lesion are those that have been made in pursuance of the formalities prescribed by law. The case before us is not of that sort.

The rehearing is refused.

State vs. Byrd.

No. 7295.

THE STATE VS. F. P. BYRD.

The correction of the minutes of court, so as to shew the prisoner's presence at a trial, which had been declared null at his instance, and on his assignment as error the failure to mention his presence in the minutes, can have no effect upon the second trial. The final decree of this court, setting aside the verdict, and annulling the judgment thereon on the ground of his presence not appearing on the minutes, is conclusive as to the irregularity of that trial.

When a judgment, rendered upon a conviction, has been vacated because the minutes did not shew the defendant's presence when the verdict was rendered, such verdict and judgment can not be pleaded in defence on a subsequent trial, and do not sustain the plea of *autrefois convict*.

A *nolle prosequi*, and the consequent discharge of the prisoner, is not a bar to a subsequent indictment for the same offence; and where there are two counts, a *nol. pros.* of the first does not bar a prosecution on the second. So where, on an indictment for murder, the prisoner is convicted of manslaughter and a new trial is obtained, a *nol. pros.* may be entered as to the charge of murder, and a new indictment be preferred for manslaughter.

When, upon an indictment for murder, there is a conviction of manslaughter only, the verdict is in legal intendment an acquittal of murder, and is a bar to the further prosecution of the greater offence.

When, upon an indictment for murder containing a single count, there has been a conviction of manslaughter, and the judgment thereon has been annulled on appeal for irregularities in the trial, the prisoner may be subjected to another trial on the same indictment for manslaughter only, and the announcement of the prosecuting attorney, that a *nol. pros.* is entered as to the charge of murder with reservation of the right to proceed for manslaughter, means only that the jury cannot consider again the charge of murder, of which the prisoner has been by legal inference acquitted, but only that for manslaughter as included in the charge of the major crime.

A PPEAL from the District Court for Bossier parish. *Turner, J.*

The Attorney General, *Thos. J. Fuller* district attorney, and *R. J. Looney*, for the State.

J. D. Watkins for the defendant.

The opinion of the court was delivered by

MANNING, C. J. The defendant was indicted for murder, was convicted of manslaughter, and on appeal from the judgment rendered thereon, which was heard last year at Monroe, it not appearing from the minutes that the prisoner was present in court at the rendition of the verdict, the case was remanded for further proceedings according to law.

When the case was again called in the lower court, the defendant offered witnesses to prove that he was present in court at the first trial, but the State objected on various grounds, one of which was, that the accused, having escaped punishment under the first judgment and sentence, by assigning as error that the minutes did not shew his presence,

could not on the second trial prove the fact of his presence at the first trial.

It is difficult to perceive what effect the testimony was supposed to have, if it had been admitted. The minutes can be corrected so as to make them conform to the truth, but the verdict and judgment rendered on the first trial had been set aside and annulled by this court. The prisoner stood at the bar as if he had never been tried. The object of offering the testimony was doubtless to shew that the first trial had been regular, but this court had already, at the instance of the accused, and upon his assigning as error the absence of any statement in the minutes of his presence, pronounced that trial irregular.

The State entered a *no'le prosequi* as to the charge of murder, reserving the right to try for manslaughter, and proceeded against the accused for the latter offence, of which he was again convicted, and sentenced to hard labour for twenty years, and to pay a fine of one thousand dollars.

A plea in bar was filed—that the prisoner had already been tried for the same offence. The plea is not good. The general principle, that one shall not twice be put in jeopardy for the same offence, is incorporated in all of our State constitutions, and in that of the United States, and is now universally recognised, but there are numerous refinements, and nice distinctions as to what is jeopardy. An eminent authority, discussing the effect of the plea of *autrefois acquit* or *convict*, as applicable to such a case as this, says—if the defendant is not present when the verdict is rendered, the judgment may be vacated, and it cannot be pleaded in defence on a subsequent trial. Wharton Crim. Law § 541 a. citing *Andrews v. State*, 2 Sneed, 550.

But when the indictment contains but one count, and that is for murder, and the State enters a *nol. pros.* as to that, can the prisoner be tried for manslaughter under that indictment? This was the ground of the motion in arrest of judgment. It is well settled, that a *nol. pros.*, and a consequent discharge of the prisoner, is not a bar to a future indictment for the same offence. *Com. v. Wheeler*, 2 Mass. 172. *Lindsay v. Com.* 2 Va. Cas. 345, *Wortham v. Com.* 5 Rand. 669. So where there are two or more counts, one for instance charging murder, and another charging manslaughter, a *nol. pros.* of the first will not bar a prosecution on the second or other count. *Com. v. Briggs*, 7 Pick. 177. *Com. v. Tuck*, 20 Pick. 364. So again, where on an indictment for murder the prisoner is convicted of manslaughter, and a new trial is obtained, the prosecuting attorney may enter a *nol. pros.* as to the charge of murder, and prefer a new indictment for manslaughter. *State vs. Hornsby*, 8 Rob. 583. But neither of these enunciations fit the present case. There was but one count, and there was no subsequent or new indictment,

and the *nol. pros.* was as to the sole offence charged in the single count.

We have found but two cases where the ruling may be argued as applicable to the one now before us. It has been held in Tennessee, that where a party is charged with a felonious assault, and a *nolle prosequi* is entered as to the felony, it operates a discharge of the assault. In that case, the defendant was indicted for an assault with intent to commit murder. The Attorney General, with the assent of the court, entered a *nol. pros.* as to the felony, and the accused was sentenced for the lesser offence. The court say—"we are of opinion that the *nolle prosequi* discharged the defendant altogether from the accusation. There is but one count in the indictment, and that count charges a felonious assault. It is true, by the statute, the jury might have acquitted the defendant of the felony, and found him guilty of an assault only, but it does not follow that a *nolle prosequi* as to the felony can be entered, and the party still remain under the charge in the indictment for an assault. It is like the case of a charge for murder, when the party may be found guilty of manslaughter only; or the charge for robbery when he may be found guilty of larceny. The charge of the greater offence includes the less, and the jury might find the party guilty of the less, and acquit him of the greater; but if the charge, for the greater be withdrawn, the charge for the less offence necessarily goes with it, because by the law the less offence is charged; not because the words of the indictment are appropriate to charge the offence, but because in legal contemplation, the less offence is charged in an indictment for a greater; and hence, when the charge as it stands in the indictment is withdrawn, there is nothing left upon which to try the defendant. It will not do to say, that the charge, constituted by the words of the indictment, may be withdrawn, and the legal idea of the inferior offence may be retained, upon which to try the defendant. Take the indictment for murder, and let a *nol. pros.* for the murder be entered. Can this be done, and the legal idea of manslaughter remain as a charge upon which to put the party on his trial? We think not. How shall he be arraigned, and to what shall he plead? Not to an indictment for murder, because that is no longer in force against him; and yet no indictment exists but the one charging him with murder, as the grand jury, in finding a true bill, necessarily find the inferior offence also. It would be competent, perhaps, for the Attorney General, with the assent of the court, to strike out the words that charge the malice and felony, leaving only such as would charge the inferior offence. But in that case, there would be a subsisting indictment, upon which the party might be arraigned and tried. It is supposed the course pursued is substantially the same thing. We do not think so." *Brittain v. State*, 7 Humph, 159.

The other case is from New York. The indictment was for rape,

State vs. Byrd.

and contained but one count. The court said ;—"The entry on the record of a *nolle prosequi* is an act by which the prosecution declares it will proceed no further with the indictment, or with that part of it specified in the order. Its effect is to put the prisoner without day to such part, and if to the whole, entitles him to a discharge from arrest, unless held for re-indictment, as the entry does not operate as an acquittal. A *nolle prosequi* may be to the whole indictment, or to the whole of any one or more of several counts, but cannot be to a part of any one count ; therefore when a *nolle prosequi* is entered to a part of an indictment containing a single count, it operates upon the whole indictment, and entitles the prisoner to his discharge, unless held for further indictment." *People v. Porter*, 4 *Parker Crim. Rep.* 524.

This case differs from both of those, in that there had been a previous trial on the charge of murder, and a conviction under it of manslaughter, which is a bar to a future prosecution for murder, because a conviction of the less offence is virtually, by way of estoppel, an acquittal of the greater, or stating it in another form, when the major and the minor offence are together before the jury, the defendant's conviction of the minor offence is an acquittal of the major, and is a bar to further prosecution of the major. *Wharton Crim. Law*, § 550. § 563. When therefore the State's attorney entered a *nol. pros.* as to the charge of murder, he used a form of words not strictly accurate. The jury had acquitted on that charge, and the State could no longer prosecute it because of that verdict. A *nol. pros.* was not to be entered as to a charge, of which there was already an acquittal. The prosecuting officer substantially recognised that the verdict of acquittal had eliminated from the indictment the charge of murder, when he announced that the prisoner could not again be tried for that crime, and as the indictment for murder contains by legal intendment, a charge of manslaughter, he virtually announced merely that he was proceeding for the minor offence, when he incorrectly said that he would enter a *nol. pros.* as to the major. It is on the theory that the charge of the greater crime includes the lesser, that modern statutes have expressly allowed the conviction of the lesser, although the indictment contain no words, apt to express such lesser crime. The court of Tennessee suggest that the prosecuting officer might strike out the words charging the malice and felony, leaving only such as would charge the inferior offence, as in that case there would be a subsisting indictment. In our case, the verdict of conviction of the lesser offence had estopped the State from proceeding for the greater, but it had not quashed the indictment, nor did it operate as a bar to a second prosecution for the lesser, the first trial having been decreed to be, in law, no trial thereof.

It may be well to mention, that when the prosecuting officer an-

State vs. Byrd.

nounced the *nol. pros.* as to murder, with reservation of the right to try for manslaughter, no objection appears to have been then made by the prisoner, but the trial proceeded, and the legal effect of the *nol. pros.* was urged in a motion of arrest. The entry of the *nol. pros.* was controlled and restricted by the reservation simultaneously made, and was really but a statement to the jury and the court that the prisoner was not put on trial for murder, of which he had been acquitted, but for manslaughter only.

Judgment affirmed.

No. 7391.

THE STATE VS. B. H. LANIER ET AL.

The Auditor of the State has no power to extend the time fixed by law for the settlement of State tax collectors, who are defaulters from the moment they fail to make their settlements at the time fixed by law.

No legal action taken by the Attorney General against a State tax collector, a month after the latter had become a defaulter for not paying funds of the State into the treasury, can make the collector a forced custodian of the funds.

A tax collector in default for not paying over State funds collected by him, and the sureties on his bond, are liable for the full amount of those funds subsequently lost through a robbery of the collector, when the evidence shows that the robbery could have been avoided by the exercise of ordinary care and diligence on his part.

A PPEAL from the Thirteenth Judicial District Court, parish of East Carroll. *Hough, J.* Trial by jury.

H. N. Ogden, Attorney General, *Jas. C. Egan*, Assistant Attorney General, and *H. R. Steele*, district attorney, for plaintiff and appellant.

W. G. Wyly, J. M. Kennedy, and *Montgomery & Deloney* for defendant and appellee.

The opinion of the court was delivered by

MANNING, C. J. This suit is instituted against Lanier, and the sureties on his bond as tax-collector for the parish of Carroll, to recover a balance of seventeen thousand five hundred and thirty-four 54-100 dollars, alleged to be due for taxes of 1875 and 1876, collected and not accounted for, with two per centum per month interest from December 20, 1876.

The defence is, that Lanier owed the State a balance of only about fifteen thousand dollars for the quarter ending December 31, 1876, the settlement of which, it is admitted, should have been made on Dec. 20, 1876, but owing to great difficulty in completing his collections, the tax collector procured from the Auditor of Public Accounts an extension of time to make his final settlement, "which extension was granted

by the Auditor until January 10, 1877," at which time he came to New Orleans prepared to make it—that he found the city in great excitement, and two rival State governments installed, each claiming to be the legitimate government, one of which, styled by him 'the Packard government,' held the State House, in which were the Auditor's and Treasurer's offices and the government archives, while the other occupied Odd Fellows' Hall, without any of the archives, and without a State Treasurer—that Allen Jumel qualified as Auditor under 'the Nicholls government' about January 8, 1877, but in fact was not inducted into office then, and obtained possession of the office and of its books and archives only in April following, and that in the meantime one Johnson was the Auditor—that Lanier was in great doubt what to do with the public funds in his hands under these circumstances, but that he finally prevailed upon Johnson to permit him to make his settlement, and pay over the funds to A. Dubuclet, the State Treasurer, and as he was about to do this, he was enjoined and prohibited from making the settlement with Johnson or payment to the Treasurer by a writ, issuing from the Fourth Court of New Orleans at the instance of Attorney General Ogden, and which was served on him on January 19, 1877, and that he thus became the forced custodian of the funds in his hands, and a depository of the same without reward—that about January 25 of same year, Lanier shipped twelve thousand dollars in U. S. currency by steamer Pargoud to Lake Providence in Carroll parish, where he resides, and also went there carrying with him the residue of the funds, and he thus transported the money because he was fearful it might be seized by one of the rival governments, if it should be left in New Orleans—that he remained in Carroll parish until about May 1st., when he started to New Orleans, funds in hand, for the purpose of making his final settlement with the only surviving government, and at Jackson, Miss., took passage in a sleeping-car, and went to bed with his vest on, in the inside pocket of which was the package containing the funds of the State, and during the night was robbed of the same—that on awaking in the morning, his vest had been cut in two large places immediately over the inside pocket, and the package was gone, whereupon he gave notice to the train conductor of the robbery, and asked that the train be stopped, or that a search be made for the money, which the conductor refused to do, and on arriving at New Orleans he informed the superintendent of the railroad of the robbery, and went to the Central Police Station and communicated the facts, and also informed the Attorney General and the Auditor thereof, and that, having used due diligence and care and prudence in keeping the money, he is not responsible for its loss.

The testimony of the defendant Lanier recites the occurrences in

the order, and to the effect, set forth in the answer, and is corroborated to this extent by W. L. McMillen. He was a passenger in the same car with Lanier, who told him he had about thirteen thousand dollars, and was on his way to New Orleans to make his settlement, and he showed the witness a package which Lanier said contained the money, and which had the appearance of such a package. On going to bed, Lanier said to the witness he would keep his vest on, and on the following morning while witness was in the wash-room, Lanier came in exclaiming that he had been robbed, and exhibited his vest which was cut in two slits transversely over the pocket. Lanier was pallid, and looked disturbed, and seemed to realize the magnitude of the disaster. The application to the conductor of the car, and the notification of the police, are proved, and this witness states that at some time during the night, after leaving Jackson and before reaching Kenner, the conductor and the porter of the car were both asleep, leaving no one on watch.

There was other testimony which we do not deem it essential to recite. The case was tried by a jury, whose verdict was for the defendants.

The verdict is manifestly wrong. The suit is for over seventeen thousand five hundred dollars, and the certified transcript from the Auditor's books shews the sum due to be the sum sued for. No attempt whatever was made on the trial to account for the difference between the sum alleged to have been stolen, and the sum due as shewn by the Auditor's books. Lanier alleges in the opening of his answer that he really owed only about \$15,000.00, and the argument of his counsel seeks only to account for that sum, which they do by assuming as proved that \$13,800.00 was in the package, and \$1,200.00 was in warrants which Lanier had received in payment of taxes. Grant everything that is thus claimed or proved, and there is a residue of \$2,535.54 wholly unaccounted for.

The receipt of the steamer Pargoud shews that a package was sent as alleged, which was said to contain \$12,000.00, and Mr. McMillen does not speak of the contents of the package, alleged to have been stolen, from personal knowledge, but only from the declarations of Lanier. No one swears to the contents of the package except Lanier. But assume the robbery proved.

It is contended that Lanier was the forced custodian of the funds of the State on and after January 19, 1877, the date of the service of the injunction upon him. The fact seems to be lost sight of on both sides, that he was a defaulter on and after December 20, 1876. The right of the State to her funds, collected by her tax-gatherer, was complete on that day, and his responsibility for the whole sum, appearing to be due by the Auditor's books, attached then, subject of course to

legal proof of having accounted for any part thereof, or of legal excuse for not accounting for any part, such as the exhibition of delinquent list, etc. It is gravely alleged in the answer, and as gravely argued, that the Auditor extended the time of settlement to January 10 following. From what source did the Auditor derive his authority to suspend the laws of the State? What law confers upon the Auditor the power to alter the provision of a statute touching the duty of a tax collector, and imposing penalties for its non-performance? Was it ever heard of, until within the last decade, that a civil officer of a State issued orders touching the conduct of other civil officers, whose duties were already prescribed by law, and directed them to do, or excused them for not doing, an act after the fashion of military commanders? The present Auditor did not publish the list of Delinquents last year at the time required by law because of the prevalence of the yellow fever, but so far from supposing that he could defer the performance of that duty at his pleasure, much less excuse others from performing theirs, he reported his non-action to the legislature, and that body passed a bill of relief in the shape of a resolution approving his course. Sess. Acts 1879, p. 34. The order or permission of the Auditor to a tax collector to refrain from doing what the law commands him to do by a given day, is nothing worth. Lanier was a defaulter on Dec. 20, 1876. No action of the Attorney General, a month afterwards, could make him a forced custodian of funds, for which his responsibility, and that of his sureties, had already attached by express mandate of law.

Leaving out of view this aspect of the question, and considering the liability of the defendants as dependent upon the use by Lanier of ordinary care and diligence, the case is against them. The evidence is, that the banks in New Orleans were receiving deposits, and transacting business in January 1877 as usual. There were numerous places where Lanier might have kept his funds safe. In April or May following when he was coming to New Orleans, the evidence shews that he could have obtained from the bank at Vicksburg bills on New Orleans. He chose to run the risk of keeping on his person funds for which the law made him and his sureties liable. But there is no pretence that the stolen package contained more than \$13,800.00, and beyond an amount of warrants, which Lanier says were for \$1,500.00, and his counsel says were \$1,200.00 and which were not stolen, there is no attempt made to account for the residue, and it must be remembered that of all the persons whom Lanier told of his possession of this money, and to some of whom he shewed a package, which he said contained money, not one speaks of its contents from personal knowledge or inspection, or in any other way than that Lanier told them it contained money, and they do not agree in the sum it was said to contain.

State vs. Lanier et al.

P. F. Kendall is surety on the tax collector's bond for sixteen thousand dollars, and Jules P. Lewis for four thousand dollars.

It is ordered, adjudged, and decreed that the verdict of the jury is set aside, and the judgment of the lower court thereon is avoided and reversed, and it is now decreed that the State of Louisiana have and recover of Benjamin H. Lanier, the sum of seventeen thousand five hundred and thirty-four dollars and fifty four cents with interest at two per centum per month from December 20, 1876 until paid, and that the State of Louisiana have and recover of Peter F. Kendall the sum of sixteen thousand dollars, and of Jules P. Lewis the sum of four thousand dollars, this judgment as between the mand Lanier to be *in solido* with him, and to be held satisfied by the payment by one or either or all of them of the full amount of the judgment against Lanier, and that the State further have and recover of the defendants the costs of both courts.

No. 7266.

W. W. WASHBURN, ADMINISTRATOR, vs. SIMON FRANK, AGENT.

The violation of the rules of this court in reference to the preparation of transcripts of appeal is no cause for the dismissal of the appeal.

Where the clerk of the lower court certifies the completeness of the transcript the mere fact that it was compiled by one of the parties will not justify a dismissal of the appeal.

Where it is not denied, it will be presumed that the motions for an appeal were applied for and granted in open court.

An intervention which has nei her been answered nor proved, must be dismissed. One who makes a contract of lease as agent of a company which has no existence, makes himself personally liable for the rent, when it appears from the evidence that he was the real lessee, and that the business for which the lease was made was his business.

A simulated sale of property subject to the lessor's lien can not defeat that lien. Damages will be given for a frivolous appeal.

A PPEAL from the Third District Court, parish of Orleans. *Monroe, J.*

Hornor & Benedict and *W. B. Lancaster* for plaintiff and appellee.

T. A. Bartlette for defendant and appellant.

T. J. Bartlette for intervenors and appellants.

The opinion of the court on the motion to dismiss was delivered by DEBLANC, and on the merits by WHITE, J.

ON MOTION TO DISMISS.

DEBLANC, J. Plaintiff moves to dismiss this appeal on the grounds:

1. That the transcript was not prepared according to the rules adopted by this court.

Washburn, Administrator, vs. Frank, Agent.

2. That it was—as shown by the clerk's certificate—compiled by defendant himself.

3. That it does not appear that the several motions for appeal copied in the record were made in open court.

I.

The violation of our rules—as regards the preparation of transcripts of appeal, is no cause for the dismissal of the appeal; but were a transcript so irregular as to increase the already incessant labors of the judges of this court, we would not hesitate to return it to the clerk of the inferior tribunal, and compel him to prepare at his costs, and in accordance with our rules, another and a suitable one. In this case the transcript is as neat as well written, and—though the classification of the documents therein embraced is not as skilled as it might have been—it does not contain any trace of that reck'less inattention which would justify its return to the clerk.

II.

The certificate of the clerk attests that the transcript is complete, and the fact that it was *compiled* by one of the parties to the suit, is assuredly not an objection which of itself is sufficient to authorize the dismissal of the appeal.

III.

The three motions made to obtain the appeal were all made within the delay prescribed by law, and during the regular term of the court which rendered the judgment. Unless we presume that the judge did not do his duty, we are bound to presume—and we do—that the appeal was applied for and granted in open court. Had this fact been denied, we would have had to consider the motion to dismiss; but it is not denied, and that motion is overruled.

ON THE MERITS.

WHITE, J. On the 7th January, 1875, William Haley, "acting as agent of Henry Bull, his partner, now absent, and also for and on his own behalf," leased to Simon Frank, agent of the Louisiana Match Manufacturing Company, composed of Leopold Frank and J. P. Purcell, certain real estate in this city for the sum of twenty-five dollars per month.

On the 24th April, 1875, Haley transferred all his right, title, and interest in the lease and leased premises to C. H. Washburn. On 24th April, 1875, Frank, agent for the Louisiana Match Manufacturing Company, acknowledged himself as the lessee of Washburn, upon the same terms as those contained in the lease from Haley. On the 23d of October, 1877, W. W. Washburn, administrator of C. H. Washburn, sued

Simon Frank, agent of the Louisiana Match Company, and the said company, for the sum of \$525, rent due. A provisional seizure issued, under which the sheriff took certain machinery, which was stored in a warehouse and which had within fifteen days been removed from the leased premises. Frank answered by a general denial. Edward Adler intervened, and claimed the ownership of the things provisionally seized, averring himself to be the *bona fide* purchaser thereof. Henry C. Bull intervened, and claimed ownership of the leased premises and the lease, averring that his agent, Haley, had no authority to transfer. He prayed that the rent sued for be decreed to belong to him. The lower court gave judgment in favor of plaintiff and against Simon Frank individually, for the amount sued for, and dismissed the interventions of Bull and Adler. Frank, Bull, and Adler appealed. We will, to avoid confusion of statement, consider the appeals separately :

1. The intervention of Bull was properly dismissed. It was never answered or *put at issue*, and no evidence was offered to sustain it.

2. Frank complains that he has been condemned personally, when he was sued only as agent. We think the judgment below correct. Frank made the lease as agent of the Louisiana Match Manufacturing Company, and was sued under the same designation taken by him in the lease. The proof entirely satisfies us that the company he assumed to represent was a myth and an awkwardly contrived fraud. Frank himself says the company was composed of Leopold Frank, his son, and one J. P. Bouchel. He adds: "This company was formed about the time the lease from Haley * * *. There were only two men in the company. It was really a partnership. I don't know where Mr. Bouchel lives. I have not seen him for more than a year. * * *. That partnership between Leopold Frank and P. Bouchel was dissolved about five months after it began. Then Leopold Frank continued the business by himself."

Despite this testimony, he insists although he paid the rent after the concern had disappeared, if ever it had an existence, that he still continued its agent. His testimony is disingenuous, evasive, if not false. The proof satisfies us that he was the real lessee; that the business was his, the property his; that he took the lease in the name of a fictitious person, probably as a preparation for the time when he would consider it expedient to dispose of the property, so as to leave the landlord without his pledge and without personal recourse. With this view, of course, the authorities quoted to the effect that an agent who acts in the name of a disclosed principal cannot be held personally liable, are inapplicable. In such a case the agent is a mere link or *nudus minister* uniting the minds of the contracting parties. Here we find but one party, and no principal, and therefore no room for doubt as to Frank's personal liability.

3. Counsel for the intervenor Adler have urged upon us a careful

Washburn, Administrator, vs. Frank, Agent.

examination of the record in order to satisfy our minds that the removed machinery was really purchased by Adler. We have given the testimony the desired examination, and have concluded, that a no more patent fraud was ever presented to the eye of a court of justice. Adler professes to have bought from Leopold Frank, the son of Simon. His memory is pertinaciously lucid, in one particular only—that he bought and paid three thousand dollars cash. In all else, he is evasive, forgetful, and, we think, untruthful. He just dropped in and bought the machinery, and paid the three thousand dollars in thousand-dollar bills. To state the contradictions with which his testimony is replete would require its reproduction.

The testimony establishes in our opinion that Simon Frank was the owner of the machinery, that he removed it to defeat and defraud the lessor, that after the pretended sale to Adler, Frank sold a part of it and exercised dominion over it, and that the sale, so called, to Adler was simulated and concocted with the object of defrauding. The appellee has filed answer praying the affirmance of the judgment with damages for frivolous appeal. We think they should be allowed; at least against Adler and Frank.

It is therefore ordered that the judgment of the lower court be affirmed, with five per cent damages against Simon Frank, and a like amount against Edward Adler.

Rehearing refused.

No. 7393.

N. O. PACIFIC RAILWAY CO. vs. E. H. GAY, TUTOR.

Where in a suit brought by a railroad corporation against the owner of land for the expropriation of a right of way the plaintiff claims under existing laws the full ownership of the land, and the defendant does not by his answer deny the right of full ownership, but merely disputes the amount of land claimed, a judgment may be properly rendered recognizing the title in fee claimed by plaintiff.

On matters of fact, this court will not disturb the finding of a jury unless it is manifestly erroneous.

In determining the amount of damage an owner of land suffers by an expropriation of a part of it in favor of a railroad company the enhanced value of the balance of the land, caused by the building of the railroad, should be allowed as an offset to the damages.

Where an owner of land, a part of which has been expropriated, appeals from the verdict of the jury and judgment of court fixing the terms of the expropriation, he must, if the judgment is affirmed, pay the costs of the appeal.

A PPEAL from the Fifth Judicial District Court, parish of Iberville.
McVea, J. Trial by jury.

Kennard, Howe & Prentiss for plaintiff and appellee.

Geo. Wailes and Barrow & Pope for defendant and appellant.

The opinion of the court on the original hearing was delivered by SPENCER, J., and on the rehearing by MANNING, C. J.

SPENCER, J. By its charter the plaintiff company is given perpetual succession and is authorized to expropriate lands for its uses in the manner provided for by existing laws. Section 1479, R. S., provides for the form of the petition in a suit for expropriation, and directs that it conclude with a prayer that the land be adjudged to the corporation, upon payment to the owner of all such damages as shall be caused him by the expropriation.

Section 1481 provides that the jury shall by its verdict determine "what is the value of the land described in the petition, etc., and what damages, if any, the owner would sustain *in addition to the loss of the land* by expropriation."

Section 1483 provides that upon payment of the amount awarded, etc., the corporation shall be entitled "to the right, title, and estate of the owner" in the lands "in the same manner as a voluntary conveyance" would give it.

Section 1485 authorizes the owner by "a special plea" to dispute "the extent of the land" to be *purchased* by the corporation.

Section 1482 requires the jury to take as the basis of assessment "the true value which the land possessed before the contemplated improvement was proposed, and without deducting therefrom any amount for the benefit derived by the owner from the contemplated improvement or work."

Proceeding under these laws, the plaintiff seeks to expropriate in full ownership a strip of land 150 feet wide across the defendant's "Augusta Plantation," with an area of 13 7-100 acres.

The answer is a general denial and a special plea that fifty feet in width would suffice for plaintiff's needs.

The case was tried by a jury of freeholders, who after trial rendered a verdict as follows:

"We find for plaintiff—right of way one hundred and fifty feet wide through Augusta Plantation *and title to the same*. We find for defendant—thirty dollars per acre, *for land*, say 13 7-100 acres as represented on map; seventy-five dollars per acre for two acres of cane destroyed by railroad company; twenty-five dollars for cane destroyed on headlands by railroad company; twenty-four dollars for corn destroyed by the railroad company; two hundred and fifty dollars damages for drainage."

The court upon this verdict adjudged the land to plaintiff in fee, upon condition of its paying the amount awarded to defendant as the price and damages.

Defendant appeals. He contends :

1st. That under the terms of the verdict the judgment should only have awarded "a right of way," and not the fee or full ownership. The verdict evidently gives plaintiff the fee. The words "and title to the same," construed by the pleadings and in connection with the balance of the verdict giving defendant "thirty dollars per acre for the land," leave no doubt of this.

There can be no doubt of the right of the plaintiff (especially in the absence of proof that the fee is *unnecessary*) to have the land adjudicated in full ownership. Our statutes seem to contemplate nothing less, and their constitutionality is not questioned by defendant. We think that the legal presumption is that the *full ownership is necessary to a corporation having perpetual existence*, and that if it is not necessary, the *onus* of showing it is on the defendant, who should specially plead it. Our statutes on this subject are special, and are not to be controlled by common-law rules where no such statutes exist, or where they are silent as to the nature and extent of the title to be expropriated.

Besides, the question as to the necessities of the road in this regard was one of fact, upon which we would hesitate to disturb the verdict of an intelligent jury of freeholders, as this was. The fact that the corporation, after expropriation, may so use or misuse the property taken as to injure the person from whom it has been wrested, is a very fit subject for legislative consideration, and some remedy ought to be provided. But it is the duty of this court to administer the law as it is, and not as it ought to be.

The 2d, 3d, and 4th points made by the defendant relate to the quantity of land needed by the plaintiff, to its value, and to the value of cane and corn destroyed. The evidence on these questions of fact is somewhat conflicting, and we can not say the jury manifestly erred. In the nature of things, a fair jury of intelligent freeholders, from the vicinage, ought to be as good judges of such facts as this court. We shall not disturb their finding.

5th. The judge *a quo* was asked by defendant to charge the jury that as offset to the damages claimed by defendant it was not competent for plaintiff to show general benefits resulting from the building of the road common to all persons who own property in the vicinity. The court in lieu of the desired charge instructed the jury that the damages beyond the value of the land taken "could be offset by the enhanced value of the land not sought to be expropriated, although other lands in the vicinity might be equally enhanced in value by said road." "That the jury had the right to set off such damages by the advantages and benefits to the owner derived from the projected railroad and the enhanced value of the property by reason of the public improvement."

We think the charge given by the court is substantially right, and sustained by authority. *Railroad vs. Lagarde*, 10 A. 150; *Railroad vs. Calderwood*, 15 A. 481. The true question for the jury was, to what amount would the *Augusta Plantation* be enhanced in value by the building of plaintiff's railroad? The amount of that enhancement could be set off against any damages which that plantation suffered by the building of the road. The purpose of the law is to save the owner from any loss resulting to the particular premises invaded. If the owner derives an advantage on one hand equal to the loss he sustains on the other what grounds has he for damages? We do not see that the proposition cited from *Cooley*, p. 569, to the effect that "benefits which the owner receives in common with the community at large, in consequence of his ownership of other property," militates against this view. Advantages derived by defendants as owners of other property than the *Augusta Plantation* obviously could not be offset to the damages done that plantation. We understand this to be the extent of the rule laid down by *Cooley*.

We see no reason to disturb the verdict and judgment appealed from, and they are affirmed at costs of appellant.

ON REHEARING.

MANNING, C. J. Two points have been considered on rehearing; 1. Whether the Railway Company should have the land in full ownership, 2. Whether the plaintiff, under the statute, should not pay the costs of appeal, as well as those of the anterior proceedings.

The claim, set up in the petition, was of the land in full ownership, and the plaintiff prayed an assessment of its value and the estimation of damages. The defendant specially pleaded that the quantity of land claimed (150 feet in width) was greater than is required for the Company's purposes, and that fifty feet was sufficient, and the prayer was that the demand for a greater width be rejected. The lower judge seized the point at issue with his usual intelligence, and directed the jury that, under the special plea, they could determine whether the quantity of land claimed exceeds what is reasonably necessary for the purposes of the Company.

The pleadings do not therefore present the issue, whether the Company is entitled to the fee in the land; or rather, it is not disputed by the pleadings that the plaintiff is entitled to the fee. The plaintiff claims it. The defendant does not contest the right to it—on the contrary, in his printed argument does "not contend that the fee cannot be taken"—but seeks only to restrict it to a smaller quantity of land.

We therefore rest our affirmance of the judgment of the lower

court upon this feature in the pleadings in this case, and upon the admission of the defendant in his brief here, reserving for the future the question whether a Railway would be entitled, as a matter of right under the statute, to the full ownership of the land in perpetuity, whenever such right is contested and is made a distinct issue in the pleadings.

We rightly decreed the costs of appeal to be paid by the defendant. The statute requires the costs of legal proceedings for expropriations to be paid by the party seeking them, but it does not follow that it should also pay the costs of an appeal, taken by the owner of property, which on examination is found not to have been well taken. In such case, the costs of appeal follow the general rule.

We shall not disturb our former decree, and it is accordingly so ordered.

No. 7258.

WIDOW MARY HARVEY vs. NELSON, LANPHIER & Co. AND R. H. SHORT.

A waiver of protest by the indorsers of a promissory note includes a waiver of demand.

A PPEAL from the Fourth District Court, parish of Orleans. *Houston, J.*

G. L. Hall for plaintiff and appellee.

Richard Shackelford for Short, defendant and appellant.

The opinion of the court was delivered by

WHITE, J. The defendants are sued as indorsers of two promissory notes, one for two thousand and the other for two thousand five hundred dollars, both dated Memphis, Tenn., April 15th, 1873, and payable respectively on the 12th and 15th January following their date. The firm of Nelson, Lanphier & Co. filed no answer, and judgment by default was rendered and confirmed against it. R. H. Short defends, on the ground of want of due demand. There was judgment against him in the lower court, and he appeals. The notes contain the following agreement or consent written on them: "On this note we hereby waive the necessity of either protest or notice. (Signed.) Nelson, Lanphier & Co., R. H. Short." The position of defendant is, that a waiver of protest is not a waiver of demand, and that no demand having been made he is discharged. The fact as to no demand is conceded, and therefore the question to be determined is solely one of law, that is, does a waiver of protest waive demand? We can see no reason why it should not. The protest necessarily includes a due demand; and if such be the case the waiver of protest of necessity waived that which was an integral or essential part of the protest. It being true to say that the demand is

contained in the protest, it must be equally true to conclude that the waiver of protest waives the demand which is included in it. This conclusion is abundantly supported by authority. The rule is thus stated by Daniels: "So, 'waiving demand and notice,' or 'I waive protest and notice,' * * * though somewhat variant in expression have the same significance, a waiver of all steps usually taken to bind the indorser. * * * The words 'I waive protest,' or 'waiving protest,' or any similar phrase importing that the protest is waived, are, when applied to a foreign bill, universally regarded as expressly waiving presentment and notice. * * In waiving protest the party is considered as not only dispensing with a formality, but as dispensing with the necessity of the steps which must precede it, and of which it is merely the formal though necessary proof which the law requires." In speaking of inland bills, he adds: "Inland bills and promissory notes may be protested by statutory enactment in many States, and the protest is accorded the same effect as to them when it is made, though it is not necessary to make it. And the weight as well as the number of authorities predominate in favor of construing a waiver of protest to signify as much when applied to inland bills and notes as when used in respect to a foreign bill. And such seems to us clearly the correct conclusion." Daniel on Negotiable Instruments, vol. ii. pp. 124, 125; Parsons on Bills and Notes, pp. 576, 577, 578. These views of the text-writers are the expression of the law as applied in many adjudicated cases.

Porter vs. Kembell, 53 Barb. 646.

Fisher vs. Price, 37 Ala. 407.

Jacard vs. Anderson, 37 Mo. 91.

Carpenter vs. Reynolds, 42 Miss. 807.

McIlvaine vs. Brady, 1 (Desney) Ohio.

Gordon vs. Montgomery, 19 Indiana 110.

Carson vs. Russell, 26 Texas 452.

In fact, we have been able to find no authority saying that a waiver of protest does not of necessity waive demand. Our jurisprudence has long since given a narrower construction to the waiver of protest than that given in most of the books, by concluding that such a waiver does not *per se* waive notice of protest.

Wall vs. Bry, 1 A. 312.

Bird vs. Le Blanc, 6 A. 470.

Wilkins vs. Gillis & Ferguson, 20 A. 538.

While we adhere to this now settled rule of commercial law we consider that the authorities by which it was established by strong implication say that the waiver of protest is a waiver of demand. In fact, in the leading and well-considered case of Wall vs. Bry the matter was so determined. This Court then said: "The term regularly protested

Harvey vs. Lanphier & Co. and Short.

fairly imports a protest made upon due demand. Does it go further, and dispense with notice? The party waives protest, and is certainly to be held to be as fully bound as if the notes had been duly protested." And after drawing the distinction between protest and notice, said that in consequence of the waiver of protest "the plaintiff when he offered this agreement in evidence stood in the same position as if he had offered a notarial protest, and nothing more." These views dispose of the case.

Judgment affirmed.

Rehearing refused.

No. 7246.

MRS. M. A. LALOIRE VS. P. S. WILTZ. BUSH & LEVERT, INTERVENORS.

This court can not entertain a demand for relief made by intervenors who have not appealed from the judgment rendered against them by the lower court.

Where a factor claiming a right of pledge on certain property sues out an injunction to prevent a judgment creditor, who has seized the property, from selling it, and the two creditors enter into an agreement that the factor shall take and sell the property, and after paying out of its proceeds certain expenses hold the balance subject to the decision of the court on the claims of the parties, the judgment creditor can not complain because the lower court did not in its decision pass on the right of the factor to issue the injunction, and the claim for damages for the illegal issuance thereof.

Where the planter or farmer pledges his growing crop to his factor under the act of 1874, and the contract of pledge is duly recorded the factor will have a right of pledge and privilege on the crop superior to the lien acquired by seizure under a *fi. fa.* of an ordinary judgment creditor. The factor's pledge covers not only the money and goods advanced by him, and proved to have been actually used in making the crop, but also all advances of money and necessary supplies that *may be required* by the planter, unless it be shown that the factor knowingly advanced money or supplies for other purposes than making the crop.

Payment by the factor of the wages due the laborers on the plantation, and obtaining a subrogation to their rights, does not exclude the factor from claiming the sum thus paid as an advance embraced by the recorded contract of pledge between him and the planter.

Money advanced by a factor to pay for the necessary mechanical labor to put the sugar-house and machinery in the condition to produce sugar is covered by the factor's lien under the statute of 1874.

A PPEAL from the Fifth District Court, parish of Orleans. *Rogers, J.*

Edward Phillips for defendant and appellant.

Breaux, Fenner & Hall for Bush & Levert, intervenors and appellees.

Bentinck Egan for other intervenors.

The opinion of the court was delivered by

WHITE, J. The plaintiff, a judgment creditor of the defendants,

Laloire vs. Wiltz.

seized under execution certain sugar and molasses, as well as other property situate or found on the Alice plantation, parish of St. Charles. Bush & Levert, by way of third opposition, enjoined the further execution of the writ, on the ground that the defendants were indebted to them in the sum of \$9979 77, with interest from various dates, along with ten per cent attorneys' fees, with brokerage and commissions. That the indebtedness, resulted from advances made by them as factors, which advances were secured by a contract of privilege and pledge, under the act of 1874 (Acts of 1874, page 114). That as pledgees of the crop they were in constructive legal possession thereof, the seizure being consequently a violation of their rights. The plaintiff joined issue, denying the right to the injunction, and prayed for its dissolution with damages. Subsequently, an agreement was entered into between the parties, to which we shall hereafter advert, by which Bush & Levert sold the entire crop, obligating themselves to retain in their hands a sum equal to the amount of Mrs. Laloire's claim. Various creditors claiming rights on the crop intervened, and sundry creditors who had intervened in the suit of Citizens' Bank vs. Wiltz, pending in the district court, parish of St. Charles, and lately decided by us, transferred by consent their claims to this suit. The whole were tried below, and one judgment rendered, dismissing the intervenors, and as between Mrs. Laloire and Bush & Levert, decreeing the latter entitled to the proceeds of the crop by them sold. Mrs. Laloire alone appealed. In this court, the intervenors whose claims were dismissed below, and who did not appeal, have filed answers to the appeal praying the reversal of the judgment, and for a decree recognizing their rights. We will consider the intervenors' pretensions before determining the controversy between Bush & Levert and Mrs. Laloire.

1. The intervenors are manifestly without the pale of relief; although their interventions were dismissed by the lower court, they did not appeal, and, therefore, can not complain. The only appellant before us is Mrs. Laloire, who seeks to reverse the judgment below, which was in favor of Bush & Levert, who are appellees, and it is a settled rule of practice that the prayer of one appellee to amend a judgment as to the others can not be entertained. *Deblanc vs. Levasseur*, 26 A. 542. *Williams vs. Le Blanc*, 14 A., 758. *Tegart vs. McCaleb*, 10 A. 290.

2. Mrs. Laloire complains on two grounds. First: That the lower court treated the parties as *in concurso* simply determining their rights to the fund; consequently not passing on the right of Bush & Levert to the injunction, or her prayer for damages consequent on the claimed illegal issuance thereof. Second: Because the claim of Bush & Levert was improperly allowed. We think neither complaint founded.

First: After the injunction issued, and after Mrs. Laloire had

answered in the manner already stated, the following agreement was entered into:

"It is hereby agreed that the entire lot of sugar and molasses seized, by virtue of an alias writ of *fi. fa.* issued in the above entitled case, by the sheriff of the parish of St. Charles shall be shipped to Messrs. Bush & Levert, of New Orleans, to be by them sold in the usual way, *the wages for taking off and making the said sugar and molasses to be paid out of the proceeds of sale thereof*, and the balance, or an amount sufficient to pay the claim of plaintiff, to be held by said Bush & Levert, subject to the final decision of the controversy in the above entitled case, it being the true intent and meaning of all parties that the rights of every one shall be unaffected by this agreement."

The very issue presented by the injunction was the right of Bush & Levert to reduce the crop to money, without regard to the seizure, their pretension being that the lien of the factor entitled them to sell, leaving creditors the faculty of exercising their rights on the proceeds. Whether such pretension was correct, is a matter which we are not called upon to decide, as the parties have consented to the sale of the crop by Bush & Levert, and to the retention by them of the proceeds. True, the agreement reserved the rights of the parties, but the reservation can not be considered as denying the very right which it expressly gave. We consider the consent as permitting Bush & Levert to sell, their power to retain as their own the balance held under the consent, being made to depend on the establishing by Mrs. Laloire of a better right than theirs. This view is a response to the complaint, that the injunction suit contained no prayer for personal judgment. The crop not seized by Mrs. Laloire on the twentieth of December, was seized on the twenty-fourth of the same month, subject, however, to a previous seizure made by the Citizens' Bank as mortgaged creditors, under which the plantation was sold; under such circumstances, we do not consider the present case a suitable one for damages, even if the claim therefor was not waived by the agreement.

Second: We think Bush & Levert have satisfactorily shown the sum of one thousand three hundred and sixty-four dollars and fifty cents (\$1364 50) due for advances after the application of the entire proceeds of the crop. Wiltz testifies as to the correctness of the account, and says the amount was really advanced in money or supplies for carrying on the planting operations of the year. The account is generally attacked on the ground, that the proof does not adequately establish the necessary nature of the supplies. It is said that the showing of such necessity is an essential element of proof to create the privilege. Such was undoubtedly the rule under C. C. 3217, which in terms gave the privilege, "for money actually advanced and used for

the purchase of necessary supplies, and the payment of necessary expenses for any farm or plantation." But the act of 1874 has made an important modification of our law on this subject. It provides: "That in addition to the privilege now conferred by law, any planter or farmer may pledge or pawn his growing crop of cotton, sugar, or other agricultural products, for advances in money, goods, and necessary supplies that he may require for the production of the same." Acts 1874, p. 114. It is as plain as words can make it that the privilege which formerly was made to depend not only on the advance of the money but also for its actual use for necessary purposes, is now caused to result from the advance of the money, goods, and necessary supplies that may be required by the planter. The old law having been so modified, and Bush & Levert having made and recorded their contract of pledge, under the terms of the act of 1874, and having shown the actual advance of the money, goods, and necessary supplies, were entitled to their pledge under the act of 1874; at all events, until their *prima facie* case was destroyed by proof that they had knowingly advanced the money or supplies for other than the purposes allowed by the act of 1874. Besides this general objection, the account is attacked as follows:

1. Objection is made to \$2368 08 paid by Bush & Levert to the laborers, because at the time of the payment Bush & Levert took a subrogation. It is said, they did not advance the money, but bought up the claims; that they only recorded their subrogation after plaintiff's seizure, hence the claim of the laborers, which had not been otherwise recorded, is primed by plaintiff. The contract of Bush & Levert was recorded long prior to the seizure, and the payment by subrogation rendered the money used for that purpose none the less an advance. Besides, the consent expressly authorized the payment of the laborers.

2. Objection to \$340 26, paid two engineers. This is we think answered by the ruling expressed on the previous one.

3. Item of \$2514 39, paid Lambert for coal. Objected to because not a necessary supply, and because not subrogated to Lambert's right. Coal is a necessary supply for making a sugar crop; that such is the case is made evident by the fact that the coal left after taking off the crop is valued at \$12, and claimed herein by plaintiff.

- 4, 5, and 6. These objections are all answered by the opinion we have expressed as to the effect of the act of 1874. In addition to these items of the account, it is said that the sums paid for laborers, brick masons, and others, for repairing the sugar-mill, and money advanced Wiltz for that purpose, give no privilege, because the law has given a privilege to the mechanic on the thing repaired, and there can not be two privileges for the one claim. That, besides, no privilege results to the factor for money advanced for these purposes, because not requisite

Laloire vs. Wiltz.

for the production of the crop. The mechanic has a privilege, it is true, but because the payment by the factor creates a privilege in his favor, there are not two privileges for one debt, for the moment the factor pays, the debt of the mechanic ceases to exist, and the advance of the factor gives rise to his privilege. While the act of 1874 gives the factors privilege for money advanced for the production of the crop, we understand that such term is intended to convey production to a marketable state, and it is difficult to comprehend how advances to pay the necessary mechanical labor to put the machinery in the condition to produce sugar do not come within the grasp of the statute. This reasoning answers the complaint as to the payments made in rebuilding or repairing the purgery which was blown down in the month of September. The coal claimed was seized on the plantation after the seizure by the bank, which issued from the district court of St. Charles. It was sold by the bank along with the plantation. It formed no part of the crop, and is not before us for distribution. The items for money paid Wiltz after the seizure we think are properly objected to under the evidence or, rather, want of it in the record, but as striking them from the account would leave Bush & Levert a balance due them, we can see no reason so to do.

We think the judgment below, so far as before us, did justice between the parties. It is affirmed.

Mr. Justice DEBLANC takes no part in the decision of this cause.

No. 6857.

LOUISIANA COTTON MANUFACTURING COMPANY VS. CITY OF NEW ORLEANS.

The constitutional provision granting to the Legislature the power to exempt from taxation property actually used for church, school, or charitable purposes is an enumeration, and excludes from exemption all property not enumerated.

A law which commutes the taxes on property not actually used for church, school, or charitable purposes, by authorizing the payment of a small stated sum in place of taxes is as much a violation of the constitution as if it wholly exempted the property from taxation.

A PPEAL from the Fifth District Court, parish of Orleans. *Rogers, J.*

John W. & W. S. Finney for plaintiffs and appellants.

H. N. Ogden, Attorney General, *B. F. Jonas*, City Attorney, and *Sam. P. Blanc*, Assistant City Attorney, for defendant and appellee.

The opinion of the court on the original hearing was delivered by **MANNING, C. J.**, and on the rehearing by **WHITE, J.**

MANNING, C. J. The plaintiff purchased ground in New Orleans,

with buildings and machinery upon it adapted to the manufacture of cotton goods, and commenced their manufacture in 1877. The board of assessors included this property in their assessment at a valuation of forty thousand dollars. In that year the plaintiff paid one hundred dollars to the State, and the same sum to the City, as a commutation for the taxes which each could claim, under authority of an act of the General Assembly, which exempted any incorporated company, whose business was the manufacture of cotton or woollen goods, from all taxes, by the payment of the sums above mentioned in due time. Sess. Acts 1875, p. 107. The object of this suit is to annul the assessment of this property, and to prevent the delivery of copies thereof to the Auditor and the Recorder of mortgages.

The exception of no cause of action was pleaded, in this; that even if the property be exempt from taxation, the plaintiff should wait until a tax is demanded before he complains, and *Roudanez v. Mayor*, 29 Annual, 271 is cited as authority. The dissimilarity in the two cases is manifest. In *Roudanez* a few persons undertook to prevent the holding of an election to determine whether a tax should be levied to aid a railway. We held their action premature because none of their rights had been invaded, and the danger they apprehended was too remote to warrant an injunction. In this case a present right is claimed to be affected, and an imminent peril to that right is sought to be averted. The assessment-roll stands in lieu of citation in legal proceedings. If the plaintiff should fail to pay the assessed tax, the deposit of the roll is the first step in a suit to enforce its payment. It was an act which might operate great injury, and he was not bound to wait until another step had been taken towards its infliction.

The defence is based upon the alleged unconstitutionality of the Act which exempts this property from taxation. It is claimed that when the constitution says, "all property shall be taxed in proportion to its value, to be ascertained as directed by law," and in the next sentence confers upon the General Assembly the power to exempt from taxation property actually used for church, school, or charitable purposes, that it means, no property shall be exempt except it be used for one of these three purposes. We have heretofore refused to adopt that construction of the constitution. *New Orleans v. Davidson*, 30 Annual, 554. *New Orleans v. Fourchy*, *Ibid.* 910.

In order to authorize the construction of the defendant, one part of the sentence must be expunged, so that it shall read—all property shall be taxed. That such was not the intent of the framers of that instrument is apparent from the permission immediately given to the legislature to exempt something. That the legislative interpretation of that sentence is not as the defendant claims, is exhibited by the frequent

exemption of property, not coming within the classes mentioned, and our construction has been in harmony with that interpretation.

The constitution has not commanded that all property shall be taxed, but that none other than an *ad valorem* tax shall be levied upon it; that is to say, whenever the legislature does tax property, it must tax it proportionate to its value. If art. 118 of the constitution read thus;—All property shall be taxed, and the taxation shall be in proportion to its value—the mandate would be unmistakeable. Taxation in proportion to value is the principle asserted in that article as it appears in the constitution. The absence of any prohibition of exemption is marked and significant. The permission to exempt certain property, because of the use to which it is applied, indicates only that the property thus used may be exempted, but does not exclude the exercise of power to exempt any other.

The legislature has constantly exercised the power to exempt other property, and has exempted it, as for example, household goods, mechanics' and labourers' tools, etc. of a specified value. Besides it is an admitted fact, that all property is not subjected to taxation, notwithstanding the provision of equality and uniformity, or even of universality. The power of the legislature to commute taxes, says Mr. Burroughs, is not restrained by the provision for equality and uniformity. Taxation, 56. This provision does not inhibit the legislature from, nor deprive it of the power of dividing the objects of taxation into classes, but only commands it to impose the same burthen upon all who are in the same class. *New Orleans v. Kaufman*, 29 Annual, 283.

The judgment of the lower court was in favour of the defendant, and is erroneous. Therefore

It is ordered and decreed that the judgment rendered below is avoided and reversed, and that the injunction of the plaintiff is maintained and perpetuated, and that the plaintiff recover of the defendants the costs of both courts.

DEBLANC, J. For the reasons given by me, in "*City of New Orleans vs. Fourchy*," reported in the 30th A. p. 910, I respectfully dissent from the opinion and decree in this case.

ON REHEARING.

WHITE, J. Section one of act No. 8 of 1875, acts of 1875, page 107, provides as follows :

"That any and all cotton and woolen factories and mills or establishments for the manufacture of cotton or woolen yarns, which are

Louisiana Cotton Manufacturing Company vs. City of New Orleans.

now in operation or which shall be put in operation at any time within five years from the passage of this act, whether by an individual or firm or incorporated company, shall upon payment of one hundred dollars at the beginning of each year to the State, and one hundred dollars to the city or parish in which said factory is situated, be exempt from further State, parish, and municipal taxation for a period of twenty years from the commencement of operations, and no other State, parish, or municipal tax shall be assessed, levied, or collected during the whole or such part of the time as said mills or factories shall be used for the purposes hereinbefore specified on the capital invested or employed in the production of said articles, nor on any lands, buildings, machinery, property, franchises, or appurtenances used therefor or therewith and necessary thereto."

Section two provides for notice by the corporation or individual of the commencement of the operations, mentioned in the preceding section, to the Auditor of Public Accounts:

Section three is as follows:

SEC. 3. *Be it further enacted, etc.,* That whenever any individual or individuals or incorporated company shall within said period of five years avail himself or themselves of the benefits and advantages conferred by this act, and shall *bona fide* commence the business of manufacturing as above indicated, the commutation and immunities granted by this act shall be in the nature of a contract not to be defeated.

Under these provisions the issues presented are whether the mandate of the constitution, found in article 118, saying "the General Assembly shall have power to exempt from taxation property actually used for church, school, or charitable purposes," strikes with constitutional nullity the provisions of the act of 1875 already quoted—and if not, whether the act of 1875 violates the terms of the same article, saying "that all property shall be taxed according to value." With these issues the matters for consideration may, we think, be analyzed and determined by examining and answering the following questions:

1. Does the provision of the constitution, as to exemption, contain an enumeration, and hence a limitation on the power of the General Assembly to exempt from taxation?

2. If so, does the act of 1875 create an exemption?

3. If not, is the act of 1875 a specific tax, and therefore a violation of the *ad valorem* rule as expressed in the constitution?

First—That the grant of power to the General Assembly to exempt property actually used for church, school, or charitable purposes, is an enumeration, and hence an exclusion of the power to exempt all property not included in its terms, is now the settled jurisprudence. We recently so held in *City vs. St. Anna's Asylum*, ante page 292, and our

Louisiana Cotton Manufacturing Company vs. City of New Orleans.

conclusion in that case was founded on an unbroken current of authority. *City of New Orleans vs. Bank of Lafayette*, 27 An. 276; *City vs. Metropolitan Loan and Savings Bank*, 27 An. 646; *City of New Orleans vs. People's Bank*, 27 An. 648; *City vs. St. Charles R. R.*, 28 An. 498; *City vs. St. Patrick's Hall*, 28 An. 512; *City vs. Lafayette Insurance Co.*, 28 An. 756.

This line of adjudicated cases is strenuously attacked as ill-considered and not founded. As a general rule, we would rest content under such circumstances by applying the doctrine of *stare decisis* in so grave matter as this is, involving the validity of a grant by the Legislature; but because of the earnestness and ability with which the views of counsel have been presented, as well as on account of our former opinion, in which we held the power of exemption to be unrestricted, which we have concluded was erroneous, we will not be content with invoking *stare decisis*, but will review the jurisprudence in order to demonstrate the correctness of the theory upon which it is founded. No two principles are more elementary, in construing State constitutions, than those teaching that every power not denied exists, and that where a power, which would if not denied exist, has the methods of or instances when it may be exercised enumerated and defined, the existence of the enumeration is a restriction on the exercise of the power to the cases covered by the enumeration.

The rule is thus stated by Judge Cooley in his work on Constitutional Limitations: "Plenary power in the Legislature for all purposes of civil government is the rule. A prohibition to exercise a particular power is an exception. In inquiring, therefore, whether a given statute is constitutional, it is for those who question its validity to show that it is forbidden. I do not mean that the power must be expressly inhibited, for there are but few positive restraints upon the legislative power contained in the instrument. The first article lays down the ancient limitations, which have always been considered essential in a constitutional government, whether monarchical or popular; and there are scattered through the instrument a few other provisions in restraint of legislative authority. *But the affirmative prescriptions and the general arrangements of the constitution are far more fruitful of restraints upon the Legislature.* EVERY POSITIVE DIRECTION CONTAINS AN IMPLICATION AGAINST EVERY THING CONTRARY TO IT, or which would frustrate or disappoint the purpose of that provision." P. 87.

And, again: "Another rule of construction is, that when the constitution defines the circumstances under which a right may be exercised or a penalty imposed, the specification is an implied prohibition against legislative interference to add to the condition or to extend the penalty to other cases." P. 64.

In fact, as instruments of construction, these rules have become truisms, and furnish the light by which courts and authors have uniformly guided their judgments and opinions along the narrow and perilous paths of constitutional interpretation. Reading by these rules the declaration that "the General Assembly shall have power to exempt from taxation property actually used for church, school, or charitable purposes," how else can it be qualified than as an enumeration? The power to exempt would have been all extensive without expression. Is not, therefore, the grant of the power, for the words are "shall have power," in particular and specified instances by necessary, by inevitable, by overwhelming inference, a limitation on the exercise of the power other than as specified? Boundless, indeed, would be the field of inquiry if not thus limited. For instance, the constitution has called this court into being and fixed the salaries of its members; shall we say that all powers not being denied, therefore because the words in the constitution fixing the salary do not say only that the legislative power to increase at will exists, or conversely speaking, that because the words "not less" are absent, that the right to decrease at pleasure can be availed of? Carry the illustration to the other departments of government, and the conclusion seems irresistibly certain, that not only fatal to government but to society and human happiness would be the departure by courts from the familiar rule *expressio unius est exclusio alterius*, with reference to which the constitutions of all the States of this Union have been adopted and construed for so many years. Nor do these views necessarily conflict with those expressed by this court in the cases *New Orleans vs. Fourchy*, 30 An. 910, or *New Orleans vs. Davidson & Hill*, 30 An. 554. In those cases, whatever may have been the words in which the thoughts were conveyed, we held in effect—

1st—That the rule of equality and uniformity was not violated by the exclusion from the objects of taxation of five hundred dollars of household and kitchen furniture, operating from the fact of its being an exclusion upon every class of society or condition of life. We say exclusion, because as justly remarked by Judge Cooley in his recent work on Taxation, "some of these, such as the exemption of household furniture, tools of trade, etc., and the limited personal property which very poor persons may be possessed of, are to be looked upon rather as being in the nature of limitations of the general rule than as exceptions from it. The taxation is only over and above what is absolutely needed for the owner's support." P. 130.

2d—That even if the provision that "all property shall be taxed according to value" was mandatory in directing that all property should be taxed, as it did not contain an enumeration of the objects of taxation it left necessarily scope to legislative discretion in defining such

objects, which discretion was not transgressed by the exclusion from the definition of the objects of taxation \$500 of household furniture.

Be this, however, as it may, our opinion in the present case is not predicated on the postulate that all property must be taxed, but that when property is taxed and comes within the general limit of the objects of taxation the only power delegated to the General Assembly to exclude either persons or classes from the general rule by it adopted is found in the constitution, that is, property "actually used for church, school, or charitable purposes." This may be illustrated by saying that if the constitutional provision were as follows: "The General Assembly may fix and define the objects of taxation, and shall have power after so fixing to exempt property actually used for church, school, or charitable purposes," we would consider an exemption of property included within the defined objects, but not embraced by the enumerated power to exempt, as violative of the constitution. For the power to define the objects of taxation would be one thing, and that of exempting from the limits as defined and fixed another. The one is the right to say generally the line where taxation begins, the other to deflect that general line as marked by general laws, so as to exclude individuals or classes from their operation. The right to make general laws and the authority to exclude individuals from them, when made, differ in their nature and effect—in their nature, because the essence of just legislation is universality; in their effect, because universality creates no contract, and leaves the powers of government to be transmitted unimpaired to each successive repository of legislative authority. Exemption, on the contrary, under given conditions enters the domain of contract and contains the germ of destruction to result from the exercise by an agent, the duration of whose mandate is limited, of the power to contract for an immunity which survives the life of the mandatary and divests the people for the future of an essential faculty of government, the right to tax.

The argument as to the power of the General Assembly to further wise purposes by a judicious use of the right to make exemptions is not cognizable by judicial tribunals. It suffices for them that the constitution has spoken. But if the judicial mind could so forget its duty as to allow arguments of expediency to enter the scales of justice against the letter of the constitution, it could but be admonished by the history of modern society of the fallacy of the alleged expediency; it could not fail to compensate the possible instrumentality for good of the power to exempt, against the certainty of harm to flow from its untrammelled use, harm creating favored classes and property, and which imports the power to abdicate the very essence of sovereignty and of all just government, a uniform, equal, and *unexempted* bearing of the public burdens.

Louisiana Cotton Manufacturing Company vs. City of New Orleans.

If, as we are told, the inhibition of the power to exempt is divesting the General Assembly of its just authority, we can not fail to see that it is a divestiture in the interest of society to prevent the contractual abandonment of an equally sovereign power against society and in the interest of selected persons or classes.

Third—The power to exempt not being within the legislative authority, except as to enumerated classes, does the act of 1875 create an exemption not covered by the constitutional provision? Certainly, the property is not either church, school, or charitable, and equally certain is it that the right not to pay taxes is an exemption from taxation. The law conferring the right so defines it; "shall be exempt from taxation" is the language of the statute. But it is said the property is not exempt from taxation; the taxes are simply commuted. That the power to commute is forbidden by the denial of the power to exempt has been determined. *City vs. Lafayette Insurance Co.*, 28 An. 756; *City vs. St. Charles Company*, 28 A. 498.

It seems obvious that these decisions are founded on reason, for the right to commute being simply an incident of the power to exempt, the negation of one is the denial of the other. The books, so far as we have been able to examine them, are singularly deficient in definitions of the right to commute. Defined from several points of conflicting thought, it may, we think, be said to be "a payment of a designated sum for the privilege of exemption, or the selection, in advance, of a specific sum in lieu of an *ad valorem* tax." If the first, it is indubitably an exemption; if the second, and this covers the third inquiry proposed, then it is a specific tax, and hence violates the rule of *ad valorem*, which prescribes that all property shall be taxed according to value. Either point of the dilemma is fatal to the plaintiff's pretensions.

For these reasons, we think our former decree erroneous. It is therefore set aside, and the judgment below is affirmed with costs.

DISSENTING OPINION.

MANNING, C. J. The constitutional mandate, contained in art. 118, requires that all taxation of property shall be *ad valorem*. To my mind, the only difficulty in the present case is presented by the question, whether the provision of the act of 1875, exempting cotton and woollen factories, etc. from further taxation on the payment of one hundred dollars to the State, and a like sum to the City or parish, is not a specific tax.

The terms of that Act preclude such a construction. It does not impose a specific tax, to be paid by the property, or its owner, unconditionally and absolutely, but it is an exercise of the legislative power of

exemption, coupling with it a requirement that in order to make that exemption practically operative, a given sum must be paid into the Treasury. If the decision in the case of St. Anna's Asylum contains anything repugnant to the opinion read on the first hearing of this cause, it must have been incidentally stated. At any rate it escaped my notice. I adhere to that opinion.

CONCURRING OPINION.

MARR, J. I prefer to put my concurrence in the decree just pronounced on the single ground that the commutation authorized by the Act of 1875, is not an exemption from taxation, but is the imposition of a specific tax, which is forbidden by the constitution, article 118.

The constitution of 1812 contained neither grant nor limitation of the power of taxation. Article 127 of the constitution of 1845, of which article 123 of the constitution of 1852 is a literal copy, seems to have had in view no other than the precise objects expressed in its terms; and to have been formed with no other design. These objects were:

1: To formulate the principle of equality and uniformity in taxation:

2: To prohibit specific taxation, by subjecting every species of property taxed to the same rate on valuation:

3: To authorize an income tax on trades and professions:

4: To recognize the power of the Legislature to select the objects of taxation, and, consequently, in the exercise of its discretion, to exempt from taxation.

The constitution of 1864, article 124, seems to have been framed with the special design of depriving the Legislature of the power to select the objects of taxation, and the consequent power of exemption, except with respect to property actually used for church, or school, or charitable purposes.

Article 118, of the constitution of 1868, is copied from article 124, of the constitution of 1864, except that it substitutes the permissive "may," for the imperative "shall," leaving it discretionary with the Legislature to levy an income tax.

It would seem to be expedient, good policy, to leave some discretion to the Legislature, some power, carefully defined and strictly limited, to exempt from taxation other property besides that actually used for church, school, or charitable purposes; but a comparison of articles 127, of the constitution of 1845, and 123, of the constitution of 1852, with the corresponding articles 124 of 1864, and 118 of 1868, will demonstrate, as I think, that it was the intention of the framers of the existing constitution to leave no discretion with the Legislature beyond that

Louisiana Cotton Manufacturing Company vs. City of New Orleans.

expressed in its terms. See the dissenting opinions in Fourchy's case 30 An. 914, 915.

The power to exempt from taxation is a very delicate and a very important one. In my judgment the exigencies of this case do not require a decision as to the extent of that power; and I prefer that it should not be passed upon finally now, because I do not consider it necessary to do so. I apprehend that the tribunals of Louisiana, perhaps some of the decisions of this Court, have been unduly influenced by decisions in other States, and the doctrines enunciated by eminent text-writers on taxation, based upon constitutional provisions and legislation, not identical with, if not materially different from our own; and that the only safe guide for us is the text of the constitution itself.

CONCURRING OPINION.

DEBLANC, J. I concur in the opinion and decree read by Mr. Justice WHITE, for the reasons given by me in the dissenting opinion by me expressed in the case of "City of New Orleans vs. Fourchy."

CONCURRING OPINION.

SPENCER, J. I concur in the decree in this case, but prefer to rest my concurrence upon grounds somewhat modified, though, perhaps, not materially different from those expressed by Mr. Justice WHITE.

I adhere to the doctrine in Fourchy's case, 30 A. p. 910, to the effect that the Legislature is not obliged to make taxation universal; that it may omit or exempt from taxation, by a general provision, the whole or a stated amount of a species of property. Perhaps it would be more exact to say that the Legislature may fix the point where taxation shall begin on any species of property that is taxed, or may omit the species entirely. Thus, it may say that household effects shall only be taxed on the excess of their value over \$500; or it may omit it entirely from the list of taxable property. But within the limits that the tax operates on any species of property, no exemption can be made, except for "church, school, or charitable purposes." Thus, in the case put, the excess over \$500 in value of all household furniture must be taxed equally and uniformly, unless it is "used for church, school, or charitable purposes."

But, in my judgment, the strongest reason for holding this act relative to taxation of cotton factories unconstitutional is that it in reality imposes a *specific tax*. The substance and marrow of that act is to fix a specific tax of \$100 on cotton factories *regardless of value*. Plaintiffs can not maintain that it is a *license tax for the privilege of carrying on a*

cotton factory, for if that be so there is no foundation for their claim of exemption from a tax *on the property itself*. Because the Legislature fixes the license of a class of persons pursuing an occupation at \$100 is no reason *that the property and capital* employed in that business be not taxed. The act declares in effect that payment of \$100 shall be in discharge and lieu of all taxes upon the property and capital of the factory. It is, therefore, necessarily a tax *on the property*, and violates article 118 of the constitution, which requires all taxation to be *ad valorem*.

No. 5976.

CECILE DUPRÉ AND HUSBAND VS. MARTIN SOYE ET AL.

Where an emancipated minor, who has sold her undivided interest in an immovable, recognizing in the act of transfer a mortgage on the property in favor of a certain mortgagee, sues to annul her emancipation (making the mortgagee a party to the suit) in order to invalidate the mortgage, and afterward, and before a final decree in the suit to annul, contests by way of third opposition the mortgagee's right to foreclose, on the ground that the mortgage was invalid because of her minority, a final decree in the suit to annul the judgment of emancipation maintaining the judgment, will be conclusive of the contest in the third opposition, in the mortgagee's favor.

No heir of a father, whether major or minor, can dispute the binding effect of a *bona fide* mortgage on community property executed by the father during the life of the mother.

A PPEAL from the Sixth District Court, parish of Orleans. *Saucier, J.*

Clark W. Besançon for plaintiff and appellee.

Edward Bermudez for defendant and appellant.

The opinion of the court was delivered by

MANNING, C. J. Martin Soye obtained executory process for the foreclosure of a mortgage upon a small tract of land, and the plaintiff filed a third opposition thereto, alleging that she is the owner of an undivided ninth part thereof, and that the several Acts to which she is a party, which apparently recognise the validity of the mortgage, were executed while she was a minor, and she now prays that they be annulled.

The plaintiff's father, Nicholas Dupré, mortgaged this property to Soye in 1852, to secure the payment of \$4,000.00, borrowed money. This loan appears to have been only partially paid, and in 1861 another mortgage was executed for \$3,000. Dupré's wife died after this second mortgage, and her succession was opened, her husband appointed administrator, who filed his account—placed Soye on his tableau as a mortgage creditor of the community—and exhibited a balance due to

Dupre and Husband vs. Soye et al.

each one of the children, nine in number, of \$357.26. This was however provisional. Soye had not been paid, and the mortgaged property had not been sold.

The father then died, and the children accepted his succession unconditionally, and were put in possession of his estate. The nine heirs went before a notary, and eight of them sold to their brother, E. S. Dupré, the mortgaged property for \$7,500.00, the stipulation being that the purchaser should assume the payment of the Soye mortgage, and for the residue he executed several notes to each of the heirs for their respective shares. This was in 1870.

During the previous year the plaintiff had been emancipated by a decree of court, and in August 1873 she instituted a suit to annul that judgment of emancipation, and it was annulled in the following month. Martin Soye was a party defendant to that suit, and so was the plaintiff's brother to whom she, uniting with the other heirs, had sold the land, and also Adolph Dupré her under tutor, and even the lawyer who had conducted the proceedings for emancipation, all of whom were charged with divers villainous frauds and ill-practices. They appealed suspensively from the judgment annulling the decree of emancipation.

A week after that decree had been rendered, this suit was filed. It is based of course upon the idea that that decree would be maintained. All the proceedings in it were had while that appeal was pending in this court. The judgment was rendered in July 1875 in favour of the plaintiff, and the appeal in the other case was still pending. That appeal was finally heard in 1876, and the judgment of the lower court was reversed. Dupré v. Dupré, 28 Annual, 418.

That ends the matter now, as it ought to have ended it then. That decree, rendered in a suit to which Soye was a party, and having for its object the invalidation of his mortgage, adjudicated the matter in dispute—determined finally the legality of the decree of emancipation, and adjudged that she was competent to do those acts, the undoing of which is the object of this suit.

But were it otherwise, she is utterly without cause of complaint. The debt which Soye holds is the debt of her father, and has been kept alive. She accepted his succession unconditionally, or if it be assumed she was unrelieved of the disability of minority, the law accepted it for her with benefit of inventory. She has no right to any portion of the land until the debt is paid, for it is not pretended that the succession ever had any funds that might have discharged the debt. The sale to the brother by all the other heirs was manifestly a family arrangement by which it was hoped their father's debt would be paid, and some surplus created for the heirs. The plaintiff seeks to avoid paying her share of the debt, and yet to take her share of the property.

The Divine command to honour thy father and thy mother is but the echo of a sentiment that nature has planted deep in the human heart, and the laws of all countries, dealing with men's acts and yet enforcing that sentiment, prohibit the child from taking the father's property unless he pays the father's debts.

The judgment of the lower court is avoided and reversed, and it is now ordered and decreed that there be judgment in favour of the defendants, and that they recover of the plaintiff their costs in the lower court, and the costs of appeal.

No. 7170.

CHAS. E. ALTER VS. JOSEPH O'BRIEN. FRANCIS JOHNSON, THIRD OPPONENT.

An appeal will lie from a judgment on an intervention on third opposition claiming less than the appealable amount, when the demand of the plaintiff is for an appealable amount.

The funeral expenses of a debtor, or of his wife and children, operate as a privilege on the real estate of the community, when there is no other source from which those expenses can be paid, and this privilege ranks any mortgage on such real estate.

When a mortgage creditor proceeds in a court of ordinary jurisdiction to enforce his mortgage on property owned by the community which had existed between the debtor and his deceased wife, a creditor with a privilege on the mortgaged property on account of the funeral expenses of the deceased wife is entitled to come in and claim his lien on the proceeds of the property, and a representative of the succession of the wife is not a necessary party to the proceeding.

A PPEAL from the Fifth District Court, parish of Orleans. *Rogers, J.*

Geo. L. Bright for plaintiff and appellant.

James Timony for opponent and appellee.

ON MOTION TO DISMISS.

MARE, J. Alter, mortgagee, obtained an order of seizure and sale against O'Brien, the mortgagor; and the mortgaged property was adjudicated to him for \$8000. Johnson took a rule on Alter and the sheriff, in the nature of a third opposition, claiming out of the price of the sale \$350. There was judgment in his favor for \$131; and Alter appealed. Johnson moves to dismiss the appeal, on the ground that the amount in controversy is not sufficient to give this court jurisdiction.

In *Picard & Weil vs. Wade*, we reviewed the jurisprudence pertinent to this question, and held that it was established, beyond controversy, "that an appeal will lie from a judgment on an intervention or third opposition claiming less than the appealable amount, where the demand of plaintiff is for an appealable amount." 30 An. 625.

The motion to dismiss is overruled.

Alter vs. O'Brien.

ON THE MERITS.

The opinion of the court was delivered by

DEBLANC, J. From the 7th of September to the 10th of October, 1877, Mrs. O'Brien and two of her children died, and—after their death—Charles E. Alter caused to be seized and sold, and—at the sale—purchased, for less than the claim which he had against defendant, the real estate mortgaged by the latter to secure said claim.

Mrs. O'Brien left nothing, and the property thus mortgaged and sold belonged to the community which existed between her and her surviving husband. He and that community are insolvent, and Francis Johnson—an undertaker—claims to be paid by preference, and out of the proceeds of the sale to Alter, the expenses incurred for the burial of Mrs. O'Brien and her children.

The district court maintained Johnson's opposition, but for exclusively the amount which he claims for the burial of the deceased wife. From that decree Alter appealed, and—in answer to his appeal—Johnson prays that the decree be amended, by allowing the whole of the account on which he based his third opposition.

Johnson's account is correct and due—this is admitted. His demand is resisted on the grounds:

1. That Mrs. O'Brien's succession owns no property, this is true; that—when the mortgage was given to Alter, she—as partner in community—had no interest in the estate subject to that mortgage—as to this we express no opinion—and that her interest in the community was and still is subordinate to its debts—as a general rule, this is indisputable.

2. That, in as much as the proceeds of the sale are insufficient to satisfy Alter's mortgage, there is no money which can be transferred to the probate court for distribution, and—if there was—alone the representative of Mrs. O'Brien's succession would be entitled to claim it.

To sustain one of his positions, plaintiff's counsel relies on our decision in *Gally vs. Dowling*, in which we held—in substance—that the curator of a succession, who does not allege the existence of debts priming the vendor's mortgage, is not entitled to the proceeds of the mortgaged property realized under an order of seizure and sale obtained by, and executed at the instance of the mortgagee. Here, instead of a curator claiming against a privileged creditor, without alleging the existence of any debt superior in rank to that of the creditor—we have an undertaker who asserts that his privilege outranks the mortgage of the adjudicatee of the *only property* which belonged to an insolvent community and insolvent spouses. We adhere to the opinion expressed in *Gally vs. Dowling*, but we do not consider it applicable to this case.

Does Johnson's claim for funeral expenses rank that of Alter, the mortgagee?

The Code expressly provides that *privilege* is a right, which the nature of a debt gives to a creditor, and which entitles him to be preferred before other creditors, *even those who have mortgages*.—C. C. 3186 (3153). Funeral charges are secured by a privilege which extends alike to movables and immovables. C. C. 3252 (3219.) Though the lessor's right on the movables found on the place leased, is of a higher nature than a mere privilege—C. C. 3218—(3185)—that extraordinary right yields to the privilege for the funeral expenses of the debtor and of his family, when there is no other source from which they can be paid. C. C. 3257 (3224).

This is just: were it not for the privilege which the law allows to those who dig the grave, furnish the coffin and drive the hearse, many a lifeless frame, deprived of sepulture, would rot in unnoted or forsaken homes. Were it not for that privilege, when Death enters a city and knocks at every door—watchful and indefatigable as it is, Charity would inevitably be unequal to the increased task which—otherwise—would be imposed upon it.

In whomsoever may be the title to the property, whether in the husband or the community, howsoever encumbered it may be, the proceeds of the sale of the property can—under no circumstances—be applied to the satisfaction of a conventional mortgage, to the exclusion of the funeral expenses incurred, not only for the debtor, but for his family, when—in the language of the Code—there is no other source from which they can be paid.

"Ce privilège"—according to the most eminent of the French commentators—"a été introduit : 1. dans l'intérêt des mœurs publiques, qui auraient été blessés si le corps d'un homme insolvable fut resté sans sépulture ; 2. dans l'intérêt de la salubrité publique, qui eut été compromise si le corps n'eut pas été enseveli. * * * Les motifs qui ont fait admettre ce privilège, l'intérêt de la décence et de la salubrité publiques, existent, soit qu'il s'agisse de l'ensevelissement de débiteur, de ses enfants et proches parents."

Troplong, Privilèges et Hypothèques, vol. 1, No. 132.

Paul Pont, Privilèges et Hypothèques, vol. 1, p. 47.

Mourlon, Examen du C. N. vol. 3, p. 502.

Gilbert, Codes Annotés, p. 912.

The objection that the funds retained by the sheriff under the order granted on the third opposition, can be paid but to the representative of Mrs. O'Brien's succession, which is not represented in this suit, is not tenable. As between Johnson and Alter—two of the creditors of an insolvent community—the right of preference claimed by the former was

Alter vs. O'Brien.

properly passed upon and determined in the jurisdiction wherein the latter proceeded to enforce his mortgage.

At the death of Mrs. O'Brien, she and her husband owned no separate estate, and the whole of the property belonging to the community which heretofore existed between them, was insufficient to satisfy its liabilities. The common property was sold, purchased by Alter, and—less a fraction—he kept, as a creditor, the proceeds of that sale. There never was in the succession of Mrs. O'Brien, there no longer is in or of the community a single right or effect upon which to administer. Johnson alone is entitled to a sum which was claimed by him, which was due and allowed to him—to which no succession is entitled, which was not allowed to, and is neither claimed by or for any succession, and that sum retained to satisfy his demand, can be paid but to him.

It is—therefore—ordered, adjudged and decreed that the judgment appealed from is amended, and that Francis Johnson recover—out of the proceeds of the sale from the sheriff to Charles E. Alter, and in preference to the latter, the sum of three hundred twelve dollars and fifty cents: the costs of the appeal to be paid by Alter—and, as thus amended, the judgment of the lower court is affirmed.

DISSENTING OPINION.

MANNING, C. J. The interest of a wife in the community property, as owner, begins only after all the debts of the community are paid. If the community is insolvent, the wife has no succession *quoad* the community property. Neither the wife nor her heirs, she being dead, have any but a contingent and eventual interest in the community, and until the final discharge of the debts for which the community is liable, it cannot be known whether this contingent interest will ever become an absolute right. *Hawley v. Crescent City Bank*, 26 Annual, 230, and authorities there reviewed. *Gally v. Dowling*, 30 Annual, 323.

The husband, O'Brien, had mortgaged this property during the existence of the community. The mortgage debt was not wholly satisfied by its sale. There was therefore no residuum, and the wife, having no separate property, had no succession to be affected by privileges of any kind.

The undertaker's claim for the funeral expenses of herself, and her children, is a sacred debt, enforceable against the surviving husband and father, but there is no succession property upon which it can operate. The relation of the husband to the community property differs in many respects from that of the wife. He is its head and master. He can mortgage and alienate it. Upon his death, the community being insolvent, it is treated as his succession, and the privileges established by law rest upon it, and will be recognized.

Alter vs. O'Brien.

But were it otherwise, how can a privileged creditor of the wife's succession proceed in his own name against a fund that was never brought into her succession, and subject it to the payment of his claim? According to the Opponent's theory, his claim is against her succession, and therefore he must prefer it against the representative of that succession. The mortgage creditor of the husband is certainly not that representative.

The only foundation, upon which the claim can rest as a privilege, is the fact that the property sold was in whole or in part succession property of the wife. It is only as a privilege that it can rank a mortgage. When the Code assigns priority of rank to funeral expenses upon succession property over certain other claims, it necessarily means the funeral expenses of the owner of the property. If this property belongs to the succession of the wife, Alter is not administering it, and the only person who could claim of him that part of the fund which belongs to her succession, would be its representative, who would have to distribute it under the orders of the probate court.

I think the Opposition should be dismissed.

Rehearing refused.

No. 7344.

SUCCESSION OF FRANCES E. LAW, WIFE OF ARCHIBALD W. BEARD.

Where a testator bequeaths all his property to his legatee, but qualifies the disposition by adding that the property is "to be used, enjoyed, and occupied," during the natural life of the legatee, nothing is devised but the usufruct of the property.

testamentary disposition which gives the usufruct of certain movables and immovables to one person who is charged with their preservation and the full property of the same, after the usufruct's death, to another person, and in case of the latter's death gives the property to still another person, is a valid disposition. It does not involve a prohibited substitution.

A PPEAL from the Parish Court of Red River parish. *Broughton, J.*

Egan & Ogden, Jos. H. Pierson, and James F. Pierson for heirs of F. E. Law, appellees.

L. B. Watkins for A. W. Beard, appellant.

The opinion of the court was delivered by

DEBLANC, J. Frances E. Law died in August 1870, leaving a last will, the most important clause of which reads as follows:

"After all my just debts are paid, I give and bequeath unto my beloved husband, Archibald Welles Beard, all my property of every kind and description, consisting of lands, stock, household and kitchen furni-

Succession of Law.

ture, farming tools, etc., to be used, enjoyed and occupied by my said husband during his natural life; and at his death, the half of my property or money, to go to Francis Henry Beard and Charles Porter Beard, children of William L. Beard and Mary Ann Law, and the other half to go to the children of Mary Ann Law and William L. Beard; and in case of the death of Francis Henry Beard, his part of the property to go to Charles Porter Beard; and in case of the death of Charles Porter Beard, his part to go to Francis Henry Beard; and in case of the death of both, then their half of the property to go to the children of Mary Ann Law, wife of William L. Beard."

This will was probated a few days after the death of the testatrix, and—more than six years after—A. W. Beard, the surviving husband, alleging that he was, under said will, the instituted heir and universal legatee of his wife, applied to the probate court to be placed—as such—in possession of all that composed her succession.

A curator was appointed to represent the absent heirs of Mrs. Beard. He filed an answer containing several admissions favorable to the applicant, and—these admissions made—denied, in general terms, the validity and legality of the last will of Frances E. Law.

The lower court recognized A. W. Beard as the instituted heir and universal legatee of his deceased wife, and ordered that—as such—he be put in possession of the property left by her, and discharged as the executor of her will.

Frances E. Law died without descendants or ascendants, and her legal heirs are a surviving sister and the children of two deceased brothers. Those children, who—in the lower court—were represented by a curator, have alone and through counsel of their own choice, applied for and obtained an appeal from the decree already mentioned, and contend:

1. That, if legal and valid in substance and in form, the last will of Frances E. Law does not constitute A. W. Beard the instituted heir and universal legatee of said deceased; but,

2. That the will referred to contains prohibited substitutions and *fidei commissa*, and is absolutely void.

Is there—in the clause of the testament which we have transcribed—a disposition by which any donee, heir or legatee, is charged to preserve for or return—the sense of the 1520th article of our Code—any thing to any third person? The testatrix gave to her husband the whole of her property, but was it—as he contends—in full ownership? Her bequest is qualified by her own expressions, and that qualification, written by herself, is "that the property designated by her was given to her husband *to be used, enjoyed and occupied* by her husband during his natural life." There can be no doubt that—so far as he is concerned—

that clause established, in his favor, but the usufruct which, by a testamentary disposition, may be established on any description of estates, movable or immovable, corporeal or incorporeal; nothing more, nothing less.

C. C. 540 (532), 541 (533), 1522 (1509).

Unless otherwise provided, the right of usufruct expires—under our laws—at the death of the usufructuary. C. C. 606 (601). In this case, its duration is fixed by a clause of the testament; the use, enjoyment and occupancy of the property, according to the terms of said clause, are to last during the life of the husband, and—during that period—he is necessarily bound to preserve for the owners, whomsoever they may be, heirs or legatees, the property subject to his usufruct.

If too strictly construed, and construed without regard to the provisions of the Code, which authorize testamentary dispositions in which, as in the case of a legacy of the usufruct to one, the naked property to another, the obligation to preserve for a third party is imposed by the terms of the will and the law, the 1520th article of the Code would not merely be inconsistent with those provisions, but in any and every case of that description, would invariably nullify the right, whatever it might be, bequeathed and acquired under the recited circumstances. C. C. 1522 (1509).

“Il résulte, en effet, des textes—says Moulon—qu’un légataire ou donataire peut être *très valablement* chargé de conserver les biens dont on le gratifie, et de les rendre à un tiers désigné.”

Moulon, vol. 2, p. 471. C. C. 540 (532); 1698 (1691).

Considering—as we do—that the legacy to A. W. Beard is plainly that of a right of usufruct, the fact that—as usufructuary—he is bound to preserve for, and that his own heirs may have to return to others the property comprised in the legacy of the usufruct, does not constitute a prohibited substitution, and cannot alone affect the validity of the disposition.

“The condition which—in the intention of the testator—does but suspend the execution of the disposition, does not hinder the instituted heir or legatee from having a right acquired and transmissible to his heirs,” from the death of the testator. R. C. C. 1699 (1692).

Up to the death of A. W. Beard, no heir, donee or legatee is charged—in the sense of article 1520 of the C. C. to preserve for or return any thing to third parties. At his death and in the words of the testament, the half of the property or money belonging to his wife, *was to go to* “Francis Henry Beard and Charles Porter Beard, children of William L. Beard and Mary Ann Law, and the other half *to go to* the children of Mary Ann Law and William L. Beard; and *in case of* the death of Francis Henry Beard his part of the property *to go to* Charles Porter

 Succession of Law.

Beard; and *in case* of the death of Charles Porter Beard his part to go to Francis Henry Beard; and *in case* of the death of both these, their half of the property to go to the children of Mary Ann Law, wife of William L. Beard."

That Mrs. Frances E. Law intended to institute, and—at least—did attempt to designate those she intended to institute as the legatees of her estate, and of the usufruct of that estate, is undeniable. She gave to her husband the usufruct of the whole of her property, during his natural life; and—immediately after she had written the clause embracing that legacy—she wrote: "at the death of my husband, the half of my property and money to go to Francis Henry and Charles Porter Beard, and the other half to go to the children of Mary Ann Law and William L. Beard."

"Sans doute—said Marcadé—il n'y a pas de termes sacramentels exigés pour créer une substitution, et il importe peu de quels mots on s'est servi si la chose y est; mais il faut que cette chose y soit certainement, évidemment, et s'il y avait ambiguïté, doute, et qu'une clause put s'entendre et dans le sens d'une substitution *et dans un autre sens*, ce serait à ce dernier qu'il faudrait s'en tenir."

Marcadé, vol. 3, p. 376.

The light of that rule dispels the thin obscurity which rests on the clause which we are called upon to construe. We admit that the words used by the testatrix do not describe and convey—as fully as she could have described and conveyed them—her wishes and her intentions; but—from those words—only one inference can be drawn, and it is that—at the death of the testatrix—her estate would pass to her preferred legatees, Francis Henry and Charles Porter Beard, and the children of Mary Ann Law and William L. Beard, subject to the usufruct bequeathed to her husband.

Mrs. Frances E. Law instituted several heirs: to one—her husband—she gave the usufruct; to the others, the ownership of her entire estate: that ownership vested in the latter at the death of the testatrix, and at the death of her husband, which—in the will—stands for the date when the established usufruct is to expire—the possession of the property composing the estate shall pass to those to whom it was given in full ownership.

The prohibited substitution, says Mourlon, comprises two distinct dispositions—one to which is attached a resolutive condition—the other to which is attached a suspensive one. The fiduciary acquires on the estate entrusted to his care a right of ownership, but not an irrevocable one: that right is subject to the resolutive condition that the party for whom the estate is to be preserved and to whom it is to be returned shall survive the fiduciary. That condition which—as to the fiduciary—

is resolutory, suspends—as to the beneficiary who is in the second degree—a conditional right.

“Voici, dès lors, les caractères de la substitution prohibée: 1—*charge de conserver* jusqu'à la mort du grevé; 2—*obligation de rendre* à cette époque, à l'appelé, s'il est alors capable de recevoir. Toute disposition qui renferme ces éléments est nulle; *en l'absence de l'un d'eux*, elle est valable.”

Mourlon, Examen du C. N. p. 468, 472.

In this case, the husband—as usufructuary—was charged, as such and in no other capacity, and charged as well by the law as by the testamentary disposition, to preserve, until his death, those of the effects subject to his usufruct, which he could enjoy without changing their substance; but neither under the will or the law, was he or could he have been charged to transmit to any one and at his death, the limited right which—by his death—is to be blotted out of existence. “Comment—as remarked by Marcadé—cette mort ferait elle passer à telle ou telle personne le bien qu'elle aréantit? Il n'y a donc pas de substitution possible pour l'usufruct.”

Marcadé, Explication du C. N. p. 382.

The assailed clause of Mrs. Beard's will has none of the characteristics indicated by Mourlon as constituting the prohibited substitution: neither the usufructuary, nor any heir, donee or legatee named by her, did—under that will—acquire any *eventual* right or *revocable* title, which was to be preserved for, and, at their death, returned to any other. In case of death of her preferred legatees, what the testatrix described as their part of her property, was to be taken by other parties designated in the will, and—as we have already inferred—taken at her death. Such a disposition is expressly authorized by the Code.

C. C. 1521 (1508).

In “Succession of Ducloslange,” this court said: “it is true that the testator does not expressly mention that he actually bequeaths to his natural children the real property of which he gives the enjoyment to their mother during her lifetime, but that such was his intention, appears to us to be fairly deducible from the declaration that the whole property *shall go* to them, or their representatives after her death.”

“It is sometimes difficult to ascertain the true character of dispositions of this sort; but in cases of doubt, it should always be presumed that the testator intended to do that which was lawful, rather than that which is prohibited by law. It is on this principle that this court, and the tribunals in France, have held that—unless a clause in a will presents a manifest substitution, and can be understood in no other manner, it will be sustained.”

4 R. R. 412; 7 M. N. S. 417; 4 L. 504.

Succession of Law.

"The usufructuary can maintain against the owner and third persons all actions which may be necessary to insure the possession, enjoyment and preservation of his rights." C. C. 556 (549). Here, at the death of testatrix, her husband was, and—since her death—has continued to be in the undisturbed possession of the property subject to his universal usufruct, and it is evident that the only object of his action was to be recognized as the sole heir of his deceased wife, and to be discharged as the executor of her will. He is but the universal usufructuary of the estate of the testatrix, and—as the latter's legatees are not parties to this action—he can not be discharged as executor.

These views dispense us from discussing the exception of prescription and *res judicata* filed by plaintiff.

We conclude:

1. That the last will of Frances E. Law contains no prohibited substitution.
2. That—by her will—her husband, Archibald W. Beard was instituted as the universal legatee of the usufruct of her estate.
3. That the universal legatees of her estate, in full ownership, are Francis Henry Beard and Charles Porter Beard, and the children of Mary Ann Law and William L. Beard, in the proportions mentioned in the will of said testatrix.

It is, therefore, ordered, adjudged and decreed that the judgment appealed from is annulled, avoided and reversed.

It is further ordered, adjudged and decreed that Archibald Wells Beard is recognized as the legatee of the universal usufruct of the estate of Frances E. Law, his deceased wife, and—this recognition excepted—his demands are rejected at his costs in both courts.

ON APPLICATION FOR REHEARING.

WHITE, J. In this case it is urged that the construction placed by us on the will of the deceased is an addition to its terms, and, therefore, practically making a will. The meaning we have given to the words "to go to," in the opinion by us expressed, is exactly that hitherto long since attached by this court to similar words in *Succession of Duclosange*, 4 R. 410; and *Roy vs. Latrolas*, 5 A. 553. Even if we thought the views expressed in these cases latitudinarian, we would hesitate long before overthrowing the settled jurisprudence giving an interpretation to certain words when used in a last will.

Rehearing refused.

No. 7233.

JOSEPH MAUMUS VS. A. V. BEYNET ET AL.

An endorsement by the clerk of the lower court, appearing in the transcript of appeal, on the back of all the documentary evidence in the case, except the note and mortgage "filed as evidence April, 1878," is a sufficient note of evidence, when it appears that the note and mortgage were made part of the petition, and that the judgment is on the note with full recognition of the mortgage.

Where the judge below makes a written statement of the oral evidence given, it is sufficient for him to declare that his statement contains as far as he can recollect, and from notes of counsel, all the facts in the case.

Where the assessment, insurance, and rental of the property in dispute show that it must be worth over \$500, this court will have jurisdiction.

Where property has been sold in a legal and *bona fide* way to pay the taxes due on it to the State, and the State becomes the purchaser, and subsequently after the time for its redemption has passed makes a valid sale of it to a third person, all mortgages on it previous to the tax sale in favor of individuals are extinguished, and no previous mortgage creditor can disturb the title or possession of any subsequent purchaser on the ground of fraud or simulation as between him and any previous purchaser.

The vendee of the purchaser of property at a tax sale has the same right to receive a title to the property from the Auditor, after the time for redeeming the property has elapsed, as the purchaser has.

A PPEAL from the Sixth District Court, parish of Orleans. *Rightor, J.*

Frank D. Chretien, for plaintiff and appellee.

Alphonse Canonge for Dufour, defendant and appellant.

ON MOTION TO DISMISS.

The opinion of the court was delivered by

MARR, J. Appellee moves to dismiss this appeal on two grounds:

First—That the record contains no note of evidence stating the documentary evidence offered on the trial; and no complete statement of the whole of the facts of the case.

Second—That this court is without jurisdiction, *ratione materiæ*, the demand being for four hundred dollars, with recognition of mortgage on the property described.

FIRST.—All the documentary evidence in the record, except the mortgage and the note, is marked by the clerk, "filed as evidence, 27th April, 1878," which was the day of the trial. This is a sufficient note of evidence.

The note and the mortgage are set out in the petition, and each is made part of the petition. The judgment is on the note, for the amount of it, with interest, with recognition of plaintiff's right of mortgage on the property described. Certainly this shows conclusively that the note and mortgage annexed to, filed with, and made part of the petition, were in evidence, and were considered and passed upon by the court.

There is a statement of facts by the judge, which purports to give the oral testimony taken on the trial. The judge says: it "contains, as far as I recollect, and from notes from counsel for plaintiff and defendant, all the facts in this case." We think this is sufficient. In fact, the complaint of appellee is that the documentary evidence, "which appears in the transcript, is not mentioned, although * * * it forms the foundation of the whole suit."

SECOND.—The note and mortgage were executed by Beynet, one of the defendants. The mortgaged property was purchased at tax sale in 1876, and conveyed to one Mrs. Otto, by the tax collector. She sold the property to Mandin, another one of the defendants. The Auditor, after the expiration of the legal delay, conveyed the property to Mandin; and Mandin, by public act, before Ducatel, notary, conveyed the property to Dufour for three thousand dollars.

The suit was brought to subject this property to the mortgage executed by Beynet on the ground that the several sales by the tax collector to Mrs. Otto, by Mrs. Otto to Mandin, by the Auditor to Mandin, and by Mandin to Dufour, were fraudulent, and without consideration.

The prayer is, that the sale and title to Mandin "be declared simulated, collusive, fraudulent, illegal, null and void: that the sale to and title of Dufour be declared equally null, void, simulated, collusive and fraudulent; and that Beynet be declared and recognized as the true and legal owner of said property."

The appeal is by Dufour; and it is manifest that the matter in controversy, so far as he is concerned, is his ownership of the property. The evidence shows that it was assessed for taxation, in 1874 and 1875, at \$5500; that it is insured at \$800; and that it is rented for \$35 a month. Beyond question the value in dispute is far above \$500; and the jurisdiction *ratione materiae* is complete.

The motion to dismiss is therefore denied.

ON THE MERITS.

In 1853, during the existence of community between Beynet and his wife, since deceased, he acquired a property in the Third District. In 1874 this property was sold by the sheriff for taxes. It was afterward redeemed by Beynet; and on the same day he mortgaged his undivided half of it to Maumus to secure a note for \$400, at one year, of same date, fifteenth October, 1874; being for a loan. In the act of mortgage it is stated that there was a general mortgage on the property in favor of the minor daughter of Beynet, for whom he was tutor, dating from twenty-fifth September, 1869.

On the twelfth of July, 1876, the property was acquired by the State for taxes of 1874, under the provisions of act 47, of 1873, section 9, page

Maumus vs. Beynet et al.

101; and on the twenty-ninth of July the State tax collector sold it to Mrs. Otto, in the name and behalf of the State, under act No. 105 of 1874, subject to the right of the owner or any mortgage or judgment creditor to redeem, for the sum of \$192 11 taxes due the State for 1874 and 1875, and costs and charges. The property went into the hands of Mrs. Otto free from mortgages imposed by Beynet.

On the twenty-third September, 1876, Mrs. Otto sold to Mandin, subject to the same right of redemption, as distinctly declared in the title, for \$348 44. About ten months after the sale by the tax collector to Mrs. Otto, four months after the expiration of the term for redemption, on the twenty-sixth May, 1877, the Auditor of Public Accounts made a deed in the name of the State to Mandin confirming the title; and on the sixteenth November, 1877, Mandin sold and conveyed the property to Dufour for the stated price of \$3100. All these titles were by public notarial acts; and they were recorded on the days of their respective dates.

In February, 1878, Maumus brought this suit, against Beynet, Mandin, and Dufour, to recover of Beynet the amount of the note of 15th October, 1874, and interest: to have the sales to and titles of Mandin and Dufour declared to be simulated, fraudulent, collusive, illegal and void; and to have Beynet recognized as the true and lawful owner of the property.

The petition charges, among other things, that Beynet, in order to defraud Maumus and to destroy his right of mortgage, permitted the property to be sold for taxes on the twelfth of July, 1876; that the sale by Mrs. Otto, and the Auditor's deed to Mandin are illegal, simulated, collusive, and fraudulent: that no consideration was paid by Mandin, whose name was merely borrowed: that the property in law and in fact is that of Beynet, who furnished the money to Mandin, his son-in-law, to buy it; and that the title was made in the name of Mandin, in order to deprive petitioner of his right of mortgage.

That the sale to Dufour is null and of no existence in law or in fact: that the same is fraudulent, collusive and simulated: that no consideration was actually paid; and that the name of Dufour was borrowed for the purpose "of still more deceiving petitioner and thus fraudulently deprive him of his legal, just, and equitable claim against the property."

The judge of the district court did not consider the badges of simulation sufficient to justify the annulling of the sales; but he was of opinion that the right to a valid title after the expiration of the period for redemption was personal to the original purchaser, and that his assignee did not enjoy the same right. He accordingly gave judgment in favor of Maumus, against Beynet, for the amount of the note and

interest; and ordered that plaintiff's mortgage be recognized, and that the property be seized and sold in satisfaction of the judgment. Dufour alone appealed.

There is no testimony to impeach in any way the title of the State, acquired twelfth July, 1876: nor the sale by the tax collector to Mrs. Otto: nor the sale by Mrs. Otto to Mandin: nor the deed by the Auditor to Mandin; nor the sale by Mandin to Dufour.

Mandin testifies that he used his own money in making the purchase: that his intention was to make his father-in-law Beynet a present of the property, if he ever was able to do so: that he intended that the debt to Maumus should be paid: that he was well off when he made the purchase: that his business afterward became bad; and that he was obliged to sell the property to Dufour in payment of a debt of \$3100, which he owed for money borrowed some time before.

There were no relations between any of these parties and Mrs. Otto, so far as the proof goes. Beynet says he knew nothing of the sale, did not know, never heard of Mrs. Otto until he received a note from her informing him of her purchase; and if he remained in possession that he must pay the rent.

It was proven that Dufour is a man of considerable means, owning several pieces of valuable real estate, and owing no debts; and that he rented the property to Beynet at \$35 a month. Mandin says he rented the property to Beynet before the sale to Dufour; but that he paid no regular rent.

Interest is credited on the note up to October, 1876; and again for six months from fifteenth October, 1876. Mandin made one, perhaps both these payments; but he says Beynet gave him the money.

On the sixteenth of October, 1876, Beynet insured the property in his name for \$800; and at the expiration of the year the insurance was renewed, it does not appear by whose order.

There is no proof of fraud or collusion between any of these parties, except so far as it may be deduced, inferentially, from the facts stated. It can not be pretended that the title acquired by the State was either fraudulent or simulated: nor that there was fraud or simulation in the title acquired by Mrs. Otto. Nothing indicates fraud or collusion between Mrs. Otto and Mandin; nor between the Auditor and Mandin: nor between Mandin and Dufour. Perhaps Mrs. Otto had discovered that Beynet owned but half the property; and that it was subject to the general mortgage in favor of the minor: and it was not unreasonable for her to prefer a present profit of \$156 33 on an investment of \$192 11, realized in less than sixty days.

If the sale by Mrs. Otto to Mandin were void for any cause, this would not benefit Maumus. The only effect would be that the prop-

erty would still belong to Mrs. Otto. The title of the State was superior to the mortgage in favor of Maumus; and neither Mrs. Otto nor her property acquired from the State was liable to Maumus for the debt due him by Beynet. If the sale by Mandin to Dufour was simulated or void for any cause, the only effect would be to leave the property and ownership in Mandin; and no proof in this record charges him or his property with liability to Maumus for the debt due by Beynet.

No inference of fraud on the part of Beynet can be deduced from the fact that two years after the mortgage to Maumus the property was sold for taxes. The act of mortgage shows that on the fourteenth of September, 1874, the property was sold by the sheriff for taxes, and adjudicated to Sittig; and that Beynet was able to mortgage it to Maumus only because on the fifteenth October, on the day the mortgage was given, Sittig, by act before the same notary, as is recited in the mortgage, transferred the property to Beynet.

Counsel for plaintiff maintains that the title conveyed to Mandin by Mrs. Otto was void because the period for redemption had not expired; and that the Auditor's deed to Mandin was void, because the vendee of the purchaser at a tax collector's sale can not demand the Auditor's confirmative deed. No argument is needed to show that the purchaser at any sale may validly sell such right as he has acquired; and if the property in his hands is subject to redemption within a certain time, it passes to the vendee subject to the same right. The right of redemption existing at the time was set out and explained fully in the conveyance by Mrs. Otto to Mandin; and as she would have been entitled to demand the confirmative deed of the Auditor, at the expiration of six months after the recording of the title of the tax collector to her, her vendee acquired precisely the same right from her.

At the time the insurance was effected by Beynet, the period of redemption had more than three months to run; and he had then an insurable interest. If he caused the insurance to be renewed, he did a very idle thing, since he could not have recovered for a loss occurring after he no longer had any interest in the property. The renewal in his name was a mere nullity. Of course Beynet could have done nothing by which the title of Dufour would have been affected or impaired.

A sale may be attacked as simulated by the creditors of the seller; but a creditor of a former owner can not attack for simulation, a title acquired at a public sale, under legal process, by which the right and title of the former owner have been divested and have vested in another. If the State in this case acquired a good title, of which there is no doubt or question, Mrs. Otto acquired a good title against the creditors of Beynet: Mandin acquired a good title; Dufour acquired a good title.

Maumus vs. Beynet et al.

If Mandin after his purchase from Mrs. Otto chose to allow his father-in-law to remain in possession, as Mrs. Otto had done, with or without the payment of rent, it is difficult to perceive how this could have prejudiced Maumus. Mandin was well off, his father-in-law was very poor. If Dufour, after his purchase chose to let the property to Beynet at \$35 a month, this could not have injured Maumus. Beynet sub-let part of the house; and thus reduced his rent; and it was a good return to Dufour—more than thirteen per cent on his investment.

The judgment of the district court in so far as it recognizes the plaintiff's right of mortgage, and orders the property in question to be seized and sold in satisfaction of the judgment in favor of Joseph Maumus against A. V. Beynet, is annulled, avoided, and reversed; and it is now ordered, adjudged, and decreed, that the suit and demand of plaintiff, in so far as they relate to Jean Marie M. Dufour and the property in question, be rejected and dismissed at plaintiff's costs; that the said Jean Marie M. Dufour be recognized and declared to be the owner of the said property, and be quieted in his title and possession of the same; and that plaintiff pay the costs of this appeal.

No. 5463.

M. GRIVOT VS. LA. STATE BANK.

A final judgment rendered by this court is not amenable to an action of nullity, instituted more than one year after the date of the judgment, on the ground of error of fact and of law. Such a judgment has the force of *res adjudicata* as to the parties to it.

A PPEAL from the Fourth District Court, parish of Orleans. *Lynch, J.*

W. W. Handlin for plaintiff and appellant.

James McConnell for defendant and appellee.

The opinion of the court was delivered by

MANNING, C. J. The plaintiff brought suit against the defendant-bank, and judgment was rendered against him in 1868, which on appeal to this court was affirmed in 1872. *Grivot v. Bank*, 24 Annual, 265. In 1874 he instituted this suit to annul those judgments, alleging that they were erroneous—that the military order of Gen. Banks had been declared illegal by the U. S. Supreme Court in *Planters Bank Tenn. v. Union Bank La.* 1 Otto, 27—that therefore there was “gross error in the judgment of the Fourth district court, and in that of the Supreme court in affirming the same to the prejudice” of the plaintiff, and that

"the court erred not only in fact, but in law, and the decree should have been in his favour."

Grant that it did err. The mere statement of the alleged ground of action is of itself a demonstration that it cannot be maintained. The plaintiff had a final hearing of his complaint by the tribunal of the last resort. He expressly alleges that it was final, and more than a year had elapsed. The judgment then rendered misapplied the law, and if you will, misunderstood the facts, and it was so ascertained afterwards from a decision of another court in another case. How can that affect his case which was already at an end?

The defendant excepted for two causes;—1. that on its face, the petition presented no legal cause of action; 2. *res adjudicata*. Either is good.

Res judicata pro veritate accipitur is a maxim of judicial necessity. Without it, the complicated business of the world could not move on. Stagnation would ensue. There must be an end of some things in order that others may begin. Nature obeys the same law. There must be decay in order that there may be reproduction.

One cannot escape the effect of a judgment by shewing that a different one would have been rendered, if proper testimony had been offered, for the judgment is *res judicata*. Groun v. Abat, 7 La. 17, and specially pp. 34 *et seq.* Broussard v. Bernard, *Ibid.* 216. Towles v. Conrad, 3 Rob. 69. If money have been paid under a judgment which has become *res judicata*, and the law upon which the judgment is based is afterwards pronounced unconstitutional, the money cannot be recovered back. Jamison v. New Orleans, 12 Annual, 346.

And so, if as in this case, the law was misunderstood and misapplied, as was afterwards ascertained in another case, the judgment, notwithstanding it is based on bad law, is *res judicata* and must stand. And so true is this, and of such large application, that the form in which the issue has been presented is of no consequence. For whether it be in a petition, or exception, or intervention, or rule, provided it is the same question between the same parties, *res judicata* bars another contest over it. *Exceptio rei judicate obstat, quoties inter easdem personas eadem quaestio revocatur vel alio genere judicii.*

The plaintiff cites Edwards v. Edwards, 29 Annual, 597, where the judgment was attacked for nullity within the year. Of course, it could not be pleaded in bar of the action of nullity during the period when the Code expressly subjects it to such attack. We have already stated that this suit was instituted after a year had elapsed from the date of the judgment.

Judgment affirmed.

Rehearing refused.

No. 7186.

W. T. HARDIE VS. TURNER, WILSON & CO.

It is not necessary to record a judgment of separation of property obtained by a wife against her husband. If otherwise in accordance with law it is valid without being recorded.

Where no decree for money is involved in the judgment of separation of property obtained by a wife, the issuance of a *fi. fa.* under such a judgment is not practicable, and therefore not necessary to perfect the judgment. And when there is no property of the husband transferred to her for the payment of her judgment, no notarial act is necessary or proper, in order to complete the judgment.

Where a party in one suit avers the validity of a judgment of separation of property procured by a wife, in order to obtain a judgment against her, he is thereby estopped from afterward contesting the validity of the separation in order to execute the judgment thus obtained.

Creditors of a wife have no right to attack, on the ground of simulation, a conveyance made by the husband to a third person.

A PPEAL from the Fourth District Court, parish of Orleans. *Houston, J.*

E. K. Washington for defendants and appellees.

Singleton & Browne for plaintiff and intervenor appellants.

The opinion of the court was delivered by

MANNING, C. J. In January 1847, Leonora C. Frierson obtained judgment of separation of property, and a dissolution of the community of acquets, against her husband William J. Frierson, which judgment was advertised in the following month. Her petition did not contain any money demand, but there was an allegation of the ownership of certain slaves, and of her desire to resume the administration of her property, and the fear of its loss through the disorder of her husband's affairs.

In April 1852, Mrs. Frierson executed, with McMain and another, a note upon which suit was instituted, and judgment was finally rendered against her therein in 1877. *Turner v. McMain*, 29 Annual, 298.

In June 1868, W. J. Frierson had acquired by purchase a lot and buildings thereon, in this City, and in March 1873 sold it to the plaintiff, Hardie. The defendants issued execution on their judgment against Mrs. Frierson, and caused to be seized all of her right and interest in the lot and buildings above mentioned, 'being the undivided half interest therein, arising from the legal community of acquets and gains existing between her and her late husband, at the time of his death.' The sheriff advertised the sale on April 20, 1877, and Hardie enjoined. That is the present suit.

The seizure was of course made on the assumption that the community of acquets between Mr. Frierson and his wife had never been dissolved. The defendants maintain that the judgment of separation

was null *ab origine*, because of the radical defects of want of publication, want of recording, and non execution.

The first ground falls before the proof of due and immediate publication, and the second is untenable in the absence of any law requiring the judgment to be recorded to give it validity. If a judgment of the wife contain a recognition of a mortgage or privilege upon the property of the husband, it must be recorded to preserve the privilege and make known the mortgage, but for that purpose only. If, as in this case, there was no mortgage claimed or established, the recording of the judgment was not needed, for recording such judgment has not been made a requisite to its validity, as has been its publication and execution, when the latter requires legal process or a notarial act. And the non execution by such process or Act is not a defect in Mrs. Frierson's proceedings, because a writ of *feri facias* could not issue on such a judgment as she obtained, nor was a notarial Act necessary or proper, when there was no property of the husband transferred to her for the payment of her judgment, but a decree for her to resume the administration of her own. *Jones v. Morgan*, 6 Annual, 630.

There can be no pretence or suspicion that the judgment of separation was sought with the view of affecting the defendant's rights. The note was executed by Mrs. Frierson five years after the decree of separation, and they obtained judgment upon it thirty years after its execution.

The validity of her judgment of separation was attacked several years ago, and upon the ground that it had never been executed, and was therefore null; and that it was obtained by collusion, and was simulated. In *Oser v. Frierson*, where these objections were made, this court said, Mrs. Frierson obtained a judgment against her husband, setting aside the slaves as her property, and dissolving the community. The judgment thus rendered was published in accordance with the Code. Nothing more was required to give it full force and effect. *Opinion Book*, No. 29, p. 56.

Independent of all this, there is another fatal objection to the right of Turner, Wilson & Co. to make the seizure of this property. In their suit against Mrs. Frierson on her note, they alleged that, though a married woman, she was judicially separated in property from her husband, and based their right to a judgment against her on the fact of such judicial decree having been rendered, for there was no allegation or pretence that she was a public merchant, or that she was bound in any other way by her execution of the note than that, being separated in property, she had a right to contract the obligation sued on. They cannot aver the legality and completeness of the separation in order to obtain a judgment against her, and afterwards contest the validity of that separation in order to execute the judgment thus obtained.

Hardie vs. Turner, Wilson & Co.

Mrs. Hardie intervened in the suit. She is the daughter of Mr. and Mrs. Frierson, and the conveyance of Mr. Frierson to his son-in-law, the plaintiff, is attacked as a simulation. Suppose it is, a creditor of Mr. Frierson might attack it, but the defendants are not his creditors, and the proof of simulation of the conveyance would only subject the property conveyed to the claims of his creditors, and could not restore it to a community, which these defendants have in judicial proceedings alleged not to have existed since 1847. Therefore

It is ordered and decreed that the judgment of the lower court is avoided and reversed, and that the plaintiff now have judgment, maintaining and perpetuating his injunction, and for costs of both courts.

No. 7071.

PAUL BELLOCQ VS. CITY OF NEW ORLEANS.

The State taxes, and the taxes due the city of New Orleans on real estate within the city limits, operate as concurrent privileges on the property, and hence no adjudication of the property under a sale for the compulsory payment of State taxes will extinguish the liens of the city for its taxes, when the price of the adjudication is not sufficient, on a proportional distribution between the city and State, to pay to the State the full amount of its taxes.

A sale of property to pay State taxes will not cancel or release either State or city taxes of a subsequent year.

Where writs of *fi. fa.* for the collection of city taxes were issued by the Superior District Court for the parish of Orleans, and not returned before that court was abolished, they did not become extinct thereby. It was not necessary or proper to return such writs, in order to obtain *aliases* from the Third District Court, to which all the pending cases in the Superior District Court were transferred.

The registry of the taxes due the city of New Orleans is a seizure of the property on which the taxes are assessed, and operates as a binding notice to all future sellers and buyers of the property; and such property can only be sold by the State, under a seizure subsequent to the registry of the city taxes, subject to the city's lien.

A PPEAL from the Third District Court, parish of Orleans. *Monroe, J.*

Lacey & Butler and Chas. Louque for plaintiff and appellee.

Sam. P. Blanc, Assistant City Attorney, and *E. H. Farrar* for defendant and appellant.

The opinion of the court was delivered by

MANNING, C. J. This suit is an injunction on the part of the plaintiff to restrain the defendant and the sheriff from selling two improved lots in this City, under two writs of *fieri facias* issuing out of the Superior District court, for the payment of the City taxes of the years 1874

and 1875, for which judgment had been rendered against widow J. B. Bellocq and the property.

The widow Bellocq was the owner of the lots, and had failed to pay the State taxes of the years 1871, 1872, 1873 and 1874. The State Tax Collector sold the property on September 21, 1875, for those taxes, and George E. Norcross bought, and received a title from the Collector on September 23. Six months precisely from that day, viz on March 23, 1876, the Auditor made the confirmatory title for the State. On the 15th. of the following month, Norcross sold to the plaintiff, who is the son of the original owner.

The State tax of any given year is based upon the assessment of that year, but is not payable until the following year, and is known by the designation of the year of assessment, while the City tax is known by the year in which it is payable. The State taxes of 1871—1874 inclusive, and the City taxes of 1874 and 1875, were due and payable when the sale took place, and were the last and only taxes due at that time.

The counsel for the City contends that a seizure and sale for the State taxes of any given year does not destroy the lien, or release the property from the lien, created in behalf of the City for its taxes of the same year, or for any taxes subsequent to that year, for the taxes of which the property was sold. Thus, the last State tax due at the time of the sale being that of 1874, the sale could not destroy the lien of the City taxes of 1874 and 1875. On the other hand the plaintiff claims that, deriving title from a purchase at a sale for State taxes which were due at the time of the sale, and the bid having been for an amount sufficient to cover those taxes, and all penalties, charges, and costs, he is protected by such conveyance, which by express enactment vests in him a full and complete title to the property, free from all incumbrances whatsoever.

This question is of great importance in every point of view. If it be true that the State tax primes every other lien to such an extent that a sale under its lien extinguishes all others, then the power of taxation delegated by the State to cities and parishes might become, if not inoperative, at least unproductive of benefit. A sale for the compulsory payment of the State taxes would deprive the cities and parishes of the power to compulsorily collect theirs. In the case of the parishes, the General Assembly has excluded such effect by requiring that when in sales for taxes, there shall not be bid a sum sufficient to cover both State and parish taxes, and all penalties and costs, there shall be no adjudication. Perhaps the plaintiff would argue that the absence of a like provision for the City taxes indicates the intention of the legislature not to extend to her the same security. But we cannot assume that nor is it a reasonable inference. When the legislature gave to the City

the power to tax, and confided to her officers the movement of the machinery necessary to realize the tax, it cannot have been intended to invent a clog which at any moment might peremptorily stop its working. This would be offering a stone when one asked for bread. Taxes are the pabulum of government. Without that food, the political body languishes and dies. The State did not create the City, and indue it with corporate life, and in the same instant benumb and palsy those functions, without the exercise of which life is soon extinct.

We think the State and City taxes are concurrent privileges, and we assimilate the rights of both to those of concurrent mortgage creditors. The distribution of the proceeds of sale, made for the satisfaction of the tax liens, is in principle *pro rata*. But under express law, no adjudication can be made to any individual of property, sold for State taxes, if the bid is insufficient to pay all the taxes and penalties due the State. The State may buy if the bid is insufficient, but none other. Sess. Acts 1873, p 101. Now since the City tax is a concurrent lien with the State tax, a sum must be bid which on proportional distribution between the City and State, will assure to the latter the full amount of its taxes, and as in this case, the bid was for less, the adjudication has not extinguished the liens of the City for its taxes.

It must not be forgotten that the City taxes are for the years 1874 and 1875, the latter being payable in that year, and being due when the State tax sale took place, while the last State tax due was that of 1874. Certainly a sale for State taxes of a given year will not cancel and release either State or City taxes of a subsequent year. *Anderson v. Rider*, 46 Cal. 134. *Cowell v. Washburn*, 22 Cal. 519. *Burrough's Taxation*, 274. *Osterburg v. Union Trust Co.* 3 Otto, 424.

The two writs of *fiery facias*, issued for the collection of the City taxes, are dated November 28, 1874 and July 12, 1875. These writs are not returnable within a given time, but only when satisfied. They issued from the Superior District court, which was then in existence. The seizure is made by recording the same in the mortgage office. The first was recorded February 2, 1875, and the last on July 26, 1875. The sale under them was advertised to take place August 14, 1877. At that time the Superior District court was abolished, and the plaintiff includes among the grounds of his injunction, the extinction of the writs by the extinction of the court that issued them.

The act abolishing the Superior District court ordered the records thereof to be transferred to the Third Court, and made this latter court, *quoad* the pending suits, the successor of the Superior court, and vested it with jurisdiction in the premises. Sess. Acts 1877, p. 86. It was not necessary or proper to return these writs in order to obtain *aliases* from the Third court. When they issued, the Superior court was in being,

and had authority to issue them, and their vitality continued, notwithstanding the extinction of the Superior court, because its existence *quoad* these writs was prolonged as it were, and merged in the Third court.

The seizure of the State tax collector was made by registry in August 1875, and his sale, under which the plaintiff's vendor bought, was made on 21st. of the following month. The certificate of the recorder of mortgages shews the registry of the City taxes prior to that time, viz the latest on July 26, 1875, and as the registry is a seizure, by the law for the collection of the City taxes, both the purchaser and the seller (the State tax collector) knew the liens of the City, and their amount and nature, and must be bound by such knowledge, conveyed in the manner the law provides. The moment a seizure of the property was regularly made, the possession of the owner ceased, and the thing seized was placed in the custody of the sheriff. *Prevot v. Hennen*, 5 Mart. 269. *Lacy v. Buhler*, 8 Mart. N. S. 662. *Wafer v. Pratt*, 1 Rob. 41. *Winn v. Elgee*, 6 Rob. 100. The property was therefore in the custody of the sheriff, under the seizure for the City taxes, prior to and when the seizure for the State taxes was made, and the City has a right to enforce its lien, notwithstanding the sale for the State taxes. We do not understand this to be at variance with, or to be a relaxation of the principle maintained in *Lannes v. Workingmen's Bank*, 29 Annual, 112 and *Jurey v. Allison* 30 Annual, 1234.

Simulation is pleaded by the defendant to the tax collector's sale and title. The widow Bellocq bought this property from the succession of her husband, the plaintiff's father. She had no means with which to purchase except her interest in the community. No settlement between herself and the heirs has been had. The plaintiff is one of those heirs. The former owner has continued to occupy the property, at a rental it is said of sixty dollars a month. When asked, what induced him to purchase the property, the plaintiff answered, "well, it was a good affair." It is not necessary to say whether or no this is conclusive evidence of the simulation charged, since we hold, that if it be not, the City was lawfully proceeding to enforce her lien for the collection of her taxes, and that the injunction of the present plaintiff was wrongfully issued. Therefore

It is ordered and decreed that the judgment of the lower court is avoided and reversed, and that there be now judgment dissolving the injunction, and that the defendant have judgment against the plaintiff for her costs in the lower court, and for those of the appeal.

Rehearing refused.

N. O. City Gas Light Company vs. Board of Assessors.

No. 7369.

N. O. CITY GAS LIGHT COMPANY VS. BOARD OF ASSESSORS.

The complaint by a taxpayer of excessive valuation of his property by the Board of Assessors can not be heard in this court when it appears that he did not appeal to the lower court for the correction of the over valuation complained of. The paid up capital stock of the New Orleans Gas Light Company is subject to assessment and taxation, like any property of that corporation. The value of such stock is to be ascertained from the market price or in any other manner.

A PPEAL from the Fourth District Court, parish of Orleans. *Houston, J.*

J. Ad. Rozier attorney for plaintiff and appellant.

Sam. P. Blanc for defendant and appellee.

The opinion of the court was delivered by

MANNING, C. J. The plaintiff is assessed on the rolls of 1878, for taxes to be paid in 1879, for the sum of three millions five hundred and forty five thousand dollars. This includes real estate valued at five hundred and sixteen thousand eight hundred dollars—horses and mules at eleven hundred dollars—vehicles at nine hundred dollars—and the capital stock of the Company and values, exclusive of the above, at three millions twenty six thousand two hundred dollars. This last includes the value of the pipes, mains, metres, and a variety of tangible, corporeal property, valued at eight hundred and forty-two dollars and fifty-one cents. Thus;—

1.	Assessment of real estate.....	\$ 516,800.00
2.	“ animals.....	1,100.00
3.	“ vehicles.....	900.00
4.	“ pipes, mains, etc.....	816,542 51
5.	“ capital and other values.....	2,209,657.49
		<hr/>
		\$3,545,000. 00

The first three items are not objected to. The fourth is complained of as excessive, and the fifth as altogether erroneous and inadmissible, as fanciful, and there being nothing in the hands of the company representing it.

The complaint of excess of valuation in the fourth item cannot be heard here. A correction of over-valuation must be sought by application to the Board of Assessors, and if not granted by it, recourse must be had to the arbitration specially provided for that contingency. Gas Light Co. vs. Bd. Assessors not yet reported. The assessment of stock and other values at over two millions is the matter in dispute. This is claimed to be not merely an over-valuation—an excessive value of something that does exist—but an imaginary value of nothing.

The assessment is justified by the defendant under the act of the

legislature providing a revenue, as being necessarily included within the sixth division of the objects of taxation. Sess. Acts 1878, p. 229. It is as follows;—All capital invested, or employed each year in trade, traffic, merchandise, or any kind of commerce, or other business, and all investments or values of any kind (except the capital stock of banks and banking associations, whose shares are assessed in the hands of the shareholders) and all other investments and values not otherwise assessed or specially exempted by law.

Transposing parts of the sentence, the descriptive words specially to be noted are, all capital invested in any other business than trade, traffic, merchandise, or commerce, and all investments and values of any kind. Then to give special force, and impart a supreme importance to the last named objects of taxation, after a particular exception is inserted, the language already used is repeated with a significant addendum—all other investments and values not otherwise assessed or specially exempted by law. The language is all-embracing. Its comprehensiveness cannot be increased. The plaintiff insists, it is not comprehensive enough to include the imaginary value of a franchise, and that no language could be.

The plaintiff's charter relates that the original Company had a paid capital of \$1,980,000.00. The legislature created a rival company, which was intended to engulf this, and named it the Crescent City Gaslight Company. One company sued the other, and the result (*Crescent City Gaslight Company. v. N. O. Gaslight Co.* 27 Annual, 138) was that each found its interest would be promoted by a consolidation. A treaty was made, and the Crescent City company, in consideration of the substantial bonus of one million and a quarter of dollars in stock, surrendered to the New Orleans company its exclusive right to make and vend gas for fifty years. The entire capital stock of the new or consolidated company, which retained the name of the old company, was fixed at ten million dollars, of which, three millions seven hundred and fifty thousand dollars was declared to be full paid. In plain words, the plaintiff considered the exclusive right to make and vend gas for fifty years, of which it was about to be deprived, was worth a million and a quarter of its stock, and it purchased that monopoly, privilege, franchise, with that amount of stock. The company gave more than that for this franchise, for by the consolidation, the holders of the new stock owned the tangible property of the old company proportionately. The franchise then was property, and it was a value. Nothing is better settled, says Burroughs, than that the franchise of a private corporation * * is property, and of the most valuable kind, as it cannot be taken, for public use even, without compensation. *Taxation*, 167. *Attorney Gen. v. Bank of Charlotte*, 4 Jones Eq. (N. C.) 287.

Franchises, says another accepted writer, like every other thing of value and in the nature of property, within the State, are subject to the power of eminent domain, and any of their incidents may be taken away, or themselves altogether annihilated by means of its exercise. Cooley Const. Lim. 281. The relinquishment of the power of taxation will never be presumed. Those who claim that it has been relinquished as to certain property or franchises, must shew it by express grant in explicit terms, and not by implication or doubtful intendment. Burroughs, Taxation, 113. Speaking of corporations and the right to tax them, the same writer says;—these artificial persons may be made to contribute to the support of the government in which they exist, and the tax may be imposed on the franchise, or the property of a corporation, or both. When imposed on its franchise the amount of the tax may be measured by its capital stock, either at par or at its nominal value, or by dividends, or it may be a specific amount. *Ibid.* 165. A tax on a corporate franchise may or may not be just or politic, but that it is within the power of the legislature to impose it cannot successfully or reasonably be questioned.

There were three and three quarters millions of dollars of capital stock paid in, and this was substantial property. The U. S. Supreme court so denominated it, in saying;—the capital stock paid in constitutes the fund raised by the corporators, with which the institutions began and carried on the particular business in which they were engaged. The injunction of the charters, which required this capital to be paid in, made it necessarily substantial property. Bank tax Case, 2 Wall. 209. The terms capital, and capital stock, are in legal intendment synonymous, and are used in legislative acts as convertible terms, though strictly not of the same meaning, and our own statutes are full of evidence of the intent to tax it. Sess Acts 1856, p. 152 sec. 68. Sess Acts 1871, p. 112 sec. 22. *Ibid.* p. 115. Rev. Stats. sec. 307. The Act of 1877 provides when it shall be assessed, and the manner of assessing it. Sess. Acts, p. 138 secs. 11 and 23, and minute directions are given in sec. 24 to place the assessment of capital stock in the fourth column of the roll, and its value is to be ascertained from the market price of the stock, or in any other manner. This latter section was amended in 1878, so that the assessment would appear not to be restricted to the capital stock paid in. Sess Acts 1878, p. 235 sec. 3.

With what force or reasonableness can it be urged that the capital stock of the plaintiff was not intended to be taxed, or that it represents nothing? If it be meant that it is intangible and incorporeal, a ready assent is given to the assertion, but that it has a real value is attested by the rise and fall of it, and such like securities every day. The pulsations of the heart of the Paris Bourse are felt instantaneously on the banks of the Thames, and on the flags of Wall street.

The assessment in this case was confined to the capital stock full paid, and the authority to make it has been vindicated. The lower court so adjudged, and its judgment is affirmed.

ON APPLICATION FOR REHEARING.

The Revenue law of 1878 (Sess. Acts, p. 234) has taken personal property out of the dominion of arbitration, and therefore we erroneously said, a correction of over valuation must be sought by application to the Assessors, and if not granted, recourse must be had to the arbitration specially provided for. That is still true of real estate, but since the Act of 1878, it is true only of that.

We see no other error in our former Opinion, and none in our decree. The rehearing is refused.

No. 7191.

JEFFERSON AND LAKE PONTCHARTRAIN RAILROAD COMPANY vs. THE CITY OF NEW ORLEANS.

The Boards of Drainage Commissioners of the various districts under the act No. 165 of 1853 are authorized to enter on any private land and dig and construct any canal that may be useful or necessary to drain and reclaim the land in those districts, subject to claims for compensation on account of any damage caused by such canal to the owners of the land on which it is dug.

Where the owner of land, being fully apprised of the projected canal, fails to have his compensation for damages fixed, as provided for by section four of the act of 1853, before the work is begun, and makes no opposition to the completion of the canal, he thereby forfeits his claim to previous compensation, and all right to an injunction on the use of the canal.

A claim for damages by the owner of the land for the wrongful cutting of the drainage canal is prescribed by two years from the time the land was actually occupied and used for the construction of the works.

Act No. 33 of the Legislature of 1831, amending act No. 165 of the year 1853 is not unconstitutional.

A PPEAL from the Sixth District Court, parish of Orleans. *Rightor, J.*

Geo. L. Bright for plaintiff and appellant.

E. Howard McCaleb, city attorney, for defendant and appellee.

The opinion of the court was delivered by

SPENCER, J. The plaintiff alleges its ownership of a strip of land about two acres wide running from North Line street, Carrollton, to Lake Pontchartrain. It charges that the board of commissioners of the second drainage district (the rights, powers, and obligations whereof

Jefferson and Lake Pontchartrain Railroad Company vs. the City of New Orleans.

have been transferred to the city of New Orleans) did in 1871 "forcibly, wrongfully, and illegally enter upon said land," and cut and excavate a drainage canal from North Line street to the lake; that it will cost to refill said canal \$75,000; that since the opening of said canal the city has used it for drainage purposes, and that said use is worth \$25,000; that the city has no right to use and maintain said canal and to drain into the same, and thus trespass upon petitioner's property.

The prayer is for an injunction restraining the city from using said canal; for judgment declaring petitioner owner of said lands; and for judgment for \$100,000, as claimed.

The city answered by general denial, and an averment that said canal was dug by authority of law, and with the consent of the plaintiff.

The court below refused the injunction, and rejected plaintiff's demands.

The questions for our solution are:

1. Did the drainage commission have legal authority to excavate said canal on plaintiff's land?

2. If so, was it a condition precedent to the exercise of that right that previous compensation be made?

3. When the owner of property required for public use permits without resistance or resort to legal remedies its occupancy and the construction of costly public works thereon can he thereafter demand and require their demolition, and enjoin their use, upon the ground that previous compensation had not been made?

4. What is the nature of plaintiff's action in this case, and is it barred by prescription?

The answer to our first question will be found in the fourth section of Act No. 165 of 1858, which reads as follows:

"That the said boards of commissioners are hereby invested with all the rights and powers necessary to thoroughly drain the several drainage districts, as expressed in the first section of this act, and to that end shall have the right at all times of entering on the lands, within the limits of the districts aforesaid, and of placing therein their engines and machinery, and of freely passing over and using the same, and of digging all necessary canals and drains, making all necessary embankments and levees, and of doing all things lawful to be done, which may be useful or necessary in draining, cleaning, and reclaiming the land within said districts.

"Said boards of commissioners are authorized to cut their lands and drains through the streets and squares, and in the event of any street selected for the location of a canal being too narrow for a draining canal and a public highway, the said board of commissioners may cause said street to be widened:

Jefferson and Lake Pontchartrain Railroad Company vs. the City of New Orleans.

"*Provided, however, that any person or corporation shall have the right, by petition addressed to any court of competent jurisdiction, to oppose any acts of the boards in the exercise of the powers conferred by this section on said boards, and it shall be the duty of such court summarily to hear and determine the same, after a full hearing of both parties; and such court shall limit the action of the boards to the exercise of the powers herein conferred in carrying into effect the provisions of this act, according to its true intent and meaning, and where the same can not be done without injury or loss to the complainant said court shall award adequate compensation.*"

It would seem that language so plain needed no commentary. The proposition, urged by plaintiff's counsel, that this act *only authorized* the digging of canals through the *public streets* and *public squares* is not worthy of refutation. We hold that the act did authorize the construction of the canal on plaintiff's lands; and, moreover, that it pointed out to it in the proviso of the fourth section the remedy, if the contemplated work would result in injury.

2. By the proviso aforesaid the Legislature made ample provision for the protection of property holders, and provided a mode of securing to them compensation for any injury resulting from the use of their property for the public purposes contemplated. The evidence shows that the plaintiff with full knowledge of the fact that this work was contemplated, for there was much correspondence between it and the board on the subject, took no steps to have its rights ascertained, or its compensation fixed; on the contrary, this immense work was begun in 1869, and continued to completion in 1871, to full knowledge of plaintiff; and not until 1877, about six years after the completion, is this suit brought, for the objects and purposes mentioned in the beginning of this opinion.

The right of demanding previous compensation in cases of this kind is personal and facultative to the owner. If he sees proper to waive his right and forego the remedy given him by law, it is his own affair, and he has no one to blame but himself. If plaintiff had instituted the proceeding authorized and provided by the fourth section, we think that under the constitution its compensation for injury would have first had to be paid, before proceeding with the work. But not having done so, it must be considered as having waived right to previous compensation. The fact that there were, preceding the commencement of this work, propositions and counter-propositions passed between plaintiff and the board, apparently without resulting in an agreement, does not vary the principle upon which we rest this branch of the case.

We can not answer our third inquiry better than by quoting the following pertinent and well-considered authorities:

Jefferson and Lake Pontchartrain Railroad Company vs. the City of New Orleans.

High on Injunctions, § 397, says: "As in all cases of the exercise of the strong arm of equity by injunction, the right to the relief may be lost by one's own negligence and delay in seeking protection. And *where the owner of land over which a railway has been constructed, has stood quietly by, and neglected to insist upon compensation at the time his land was taken, and has waited until the road was in full operation before asserting his rights, he will not be permitted to restrain its operation.*"

And in the case of Goodin vs. Cincinnati, etc., 18 Ohio St., 169, Justice Welch, delivering the opinion of the court, said:

"Where a party stands by, as we must presume the plaintiffs to have done in the present case, and silently sees a public railroad constructed upon his land, it is too late for him, after the road is completed, or large sums have been expended on the faith of his apparent acquiescence, to seek by injunction, or otherwise to deny to the railroad company the right to use the property. Considerations of public policy, as well as recognized principles of justice between parties, require that we should hold in such cases that the property of the owner can not be reclaimed, and that there only remains to him a right of compensation. *The injunction in the present case might have been sought at the first known attempt, or even threat to despoil the land, or to construct the railroad upon its line. The omission to do so is an implied assent.* The work being completed, the public, as well as those directly interested in the road, as stockholders and creditors, have a right to insist on the application of the rule."

Hilliard on Injunctions contains the same principle. At § 43 he says:

"To entitle the plaintiff to an injunction, he must not be guilty of any improper *delay* in applying for relief. And this, although the application be on behalf of the Attorney General. If a party is guilty of laches, or unreasonable delay in the enforcement of his rights, he thereby forfeits his claim to equitable relief—more especially where a party, being cognizant of his rights, does not take those steps to assert them which are open to him, but lies by, and suffers other parties to incur expenses and enter into engagements and contracts of a burdensome character.

"The court looks most minutely to the time in which (the parties) have permitted the matter to proceed, and will not allow them to obtain an injunction in the absence of the other party, when they have themselves, for some time, acquiesced. *Acquiescence*, although not conferring a right on the opposite party, deprives the complainant of his right to the interference of a court of equity. *Unless the applicant has acted promptly*, he is held to have impliedly authorized what he now objects to. Thus, where a party applies to stay operations upon a large

Jefferson and Lake Pontchartrain Railroad Company vs. the City of New Orleans.

and costly work, *it should appear* that he applied for an injunction as soon as he became apprised of his rights and the extent of the threatened injury."

Our fourth inquiry is as to the nature and character of the plaintiff's demand, and the prescription applicable to it. It will be seen by our synopsis of the allegations and prayer of plaintiff's petition, that so far as relates to the money demand, it is in damages for the "forcible, wrongful, and illegal entry" upon its lands, and cutting a canal thereon in 1871. To this demand defendant pleads the prescription of one and two years, under arts. 3536 and 2630 of C. C. The last paragraph of the latter article reads as follows :

"*All claims for land, or damages to the owner, caused by its expropriation for the construction of any public works, shall be barred by two years prescription, which shall commence to run from the date at which the land was actually occupied and used for the construction of the works.*"

Plaintiff's action clearly falls within the scope of this article, and his action is barred. So far as plaintiff seeks to make its action petitory, it is sufficient to say that the act of 1858, under which the canal was dug, does not contemplate vesting in the board of commissioners or city *the fee*, but only a right of servitude of drain through plaintiff's lands. The city asserts no right of ownership in the soil, and the decree herein in no manner affects plaintiff's ownership thereof.

It is further objected by plaintiff that the act of 1861, No. 33, (amendatory of the act 165 of 1858) whereby the limits of the Second Drainage District now extended, to embrace plaintiff's lands, is unconstitutional as violative of arts. 115 and 116 of the constitution of 1852. We have lately had occasion in the case of *Hammond vs. E. Lesseps et al.*, ante 337, to consider objections of this kind to the constitutionality of laws. Under the rules there stated we are not prepared to say that the act is open to the objections made.

The judgment is affirmed with costs.

No. 7310.

THE STATE VS. HAMP JOHNSON.

There is no law requiring that three days should intervene between a verdict in a criminal case and the judgment pronounced thereon.

A PPEAL from the Parish Court of Iberville. *Cole, J.*

J. Hamilton Rills, District Attorney *pro tem.*, for the State.
Defendant unrepresented.

The State vs. Johnson.

The opinion of the court was delivered by

MANNING, C. J. The accused was convicted of an assault with a dangerous weapon, and sentenced to six months confinement at hard labour. Eight days after the verdict had been rendered, the prisoner's counsel moved to set it aside on the ground (we quote the language of the motion literally) "that said verdict is illegal and irregular, having been pronounced and rendered without giving him three judicial days within which to apply for a new trial."

A verdict is necessarily the conclusion of a trial, unless in Iberville they reverse the order, and have the trial after a verdict of conviction. The complaint is, that the accused did not have three judicial days, before the verdict was rendered, in which to apply for a new trial. Until the verdict was rendered, the accused could not know what was the result of his trial, and therefore could not know whether he would need a new one.

Possibly there was some confusion of ideas about verdicts and judgments, and the two were confounded or supposed to be identical, and it may be that the motion was intended to mean, that three days should intervene between a verdict in a criminal case and the judgment pronounced thereon. We know of no law to that effect. The Code of Practice does not regulate criminal trials.

Judgment affirmed.

No. 5865.

CHARLES MADUEL, EXECUTOR, ET AL. VS. JULES TUYES ET AL.

Where real estate is purchased by *A*, and actually is and continues to be his, but the title to which is taken in the name of *B*, and *A* gives a letter of secret instructions to *B*, in virtue of which *B*, after the death of *A*, transfers the property to *C* who consents to disburse a part of the revenues of the property to carry out certain lawful purposes of *A* set forth in his secret instructions, the heirs of *A* may nevertheless recover from *B* and *C* the property thus conveyed or the value thereof. The letter of instructions having no authentic form, can not be construed as a donation *inter vivos*, and there being no proof of its having been designed as an olographic will, it follows that the property which was sought to be disposed of by it, remained a part of *A*'s succession.

A PPEAL from the Fifth District Court, parish of Orleans. *Cullom, J.*

G. L. Bright for plaintiffs and appellees.

J. Ad. Rozier for *J. Leveque*, defendant and appellant.

The opinion of the court was delivered by

MANNING, C. J. Charles Maduel, as executor of *J. M. Caballero*, and *Maria Conte*, assisted by her husband, as sole heir of *Caballero*,

Madel, Executor, et al. vs. Tuyes et al.

sue the defendants for the recovery of a lot and building thereon in this city, and for the rents thereof from Caballero's death, May 1, 1866, at two hundred dollars a month. They allege that Caballero was the owner of the property, though the title was nominally in Tuyes, who made a simulated transfer of it to Fernandez y Lineras for the stated price of \$17,000.00, one third cash, and the residue on a credit of one and two years—that Tuyes had secret instructions from Caballero to transfer the property after his (Caballero's) death to Charles J. Leveque for certain purposes, and that Tuyes, Fernandez, and Leveque fraudulently confederated to deprive Caballero's succession of it. The plan is alleged to be this;—Tuyes sold to Fernandez, a friend of Leveque, as above stated, but the latter was the beneficiary of the sale, and received the price, and sold the notes, which represented two thirds of it, the object being as is alleged to incumber the property with a mortgage and vendor's lien. Judgment was sought against these three parties, but in the event it should appear that the mortgage notes are a real and valid incumbrance on the property, it is prayed in the alternative the property can not be returned to the succession unincumbered, that they be condemned to pay seventeen thousand dollars with interest, and the rents. Judgment was rendered below, on the verdict of a jury, against Tuyes and Leveque for the full amount claimed. A plea of Fernandez to the jurisdiction was sustained. Tuyes and Leveque appeal, and in this court a discontinuance has been entered as to Tuyes.

The answers are the general issue, and a special denial of Maria Conte's quality of heir.* Her status as heir was fixed by the decree of this court in *Suc. Caballeros v. His Executor*, 24 Annual, 573.

It is not pretended that the *légitime* of the heir is diminished or affected by the disposition of this property, made by the ancestor. It was bought really by Caballero, whose secret instructions to Mr. Tuyes, dated April 5, 1865, were to pay to Madame Toussaint, mother of his late wife, seventy dollars monthly out of the rents, after deducting all expenses for taxes, repairs, etc., and if funds were in hand, to pay the annual expenses of keeping the tomb in which were deposited the remains of his wife and children, including four dollars a month to the keeper of the cemetery, and upon Caballero's death, to sell the property, and deliver the proceeds to Charles Leveque, to whom Caballero had given instructions what to do with it. Leveque discloses, in his testimony, that these instructions were to keep the tomb in order, to ornament it, to "defend Caballero's honour from vile persons, and to make charity."

There would seem to be no good reason why a gift, coupled with such conditions, should not be valid when the *légitime* of the heir is not affected by it. The object of the donor was honourable. There was .

nothing illegal, immoral, or contrary to public policy in the purpose of Caballero, and unless the manner in which he attempted to effectuate it was illegal, the donation must stand. It will be perceived we are treating the transaction as if the evidence of it were a deed from Caballero to Tuyes, or to Leveque, by which he consecrated a certain property, or the fund arising first from its rents, and afterwards from its sale, to specified objects, in themselves licit and not reprobated. Such donation is not in fraud of an heir, who has got all that the law says she must have.

The destination of this property by Caballero, even if it had assumed the form of a donation, was liable to revocation during his life. He had expressly postponed its operation until after his death. "I being dead, of the product of said property" you will thus dispose, was his language. During Caballero's life, Leveque himself rented the property from Tuyes, and paid the latter the rents. Caballero did not assume to exercise any control over it. He had confided the trust to his friend Tuyes, and that trust was honourably and faithfully executed. The sale was made after his death, and there can be no question that a *bona fide* purchaser from Tuyes, either before or after Caballero's death, would have acquired a good title against all the world. Before the sale was made, the plaintiff gave notice to Tuyes that she claimed the property by right of heirship to Caballero—the same right that she is now seeking to enforce.

The paper-writing, called 'instructions' of Caballero to Tuyes, may be either a donation *inter vivos* or *mortis causa*, if it have the form of either of those instruments, and is not in other respects obnoxious to the requirements of the Code. Property cannot be acquired nor disposed of gratuitously, unless by donation in one of these forms. Civil Code, art. 1453 new no. 1467, although a manual gift of corporeal movables, accompanied by a real delivery, is not subject to any formality. *Ibid.* art. 1526 new no. 1539. Every donation of immovable property *inter vivos*, and of such incorporeal things as rents and credits must be made by notarial Act under penalty of nullity. *Ibid.* art. 1523 new no. 1536. It is manifest that if these 'instructions' are to be considered as a donation *inter vivos* of the property, the want of the form imperatively prescribed strikes them with nullity. The instructions are a private and secret letter, addressed by Caballero to Tuyes. And whatever intentions Caballero may have had as to the permanence of the destination of the property, there can be no question the destination was revocable by himself at any time during his life. He had expressly directed that the property should not be alienated until after his death, and although he could not have revoked to the detriment of a *bona fide* purchaser from Tuyes, who had acquired while the title was, by Cabal-

Maduel, Executor, et al. vs. Tuyes et al.

lero's own act, in Tuyes, he could have forced the latter to convey or reconvey to himself. The form of a donation *inter vivos* is wanting, and we cannot hold the instrument valid as such.

It occurred to us, while in consultation, that it might be a donation *mortis causa*, and as that question had not been raised in either the oral or printed arguments, we invited briefs from both counsel on that point. The counsel for the defendants at once, not only admitted but insisted that it was not a donation *mortis causa*, and thus the last prop was taken away from his clients' defence. We examined the question however, much aided and facilitated by the brief of counsel of plaintiff.

The 'instructions' have apparently the form of one kind of donations *mortis causa* i. e. olographic wills. Of course we are not to say here that the document was wholly written, dated, and signed by the testator, since proof of that would only be furnished, if the paper had ever been offered for probate as a will, and it never has been so offered.

It would not have mattered what the document was called. The name given to an act of last will is of no importance, and testamentary dispositions may be made under any name, provided the intention to testate is apparent. Neither would it have been of any consequence that the instrument contained a disposition of only a part of the testator's property. Civil Code, art. 1563 new no. 1570. It has one of the essential qualities of a testament. It was to take effect only after his death.

But if it has the form of an olographic will, the manner in which Caballero has sought to accomplish his design, is reprobated by the law.

The French authorities throw more light than our own on this question. A case at Besançon, involving the kind of disposition now before us was decided adversely to its legality;—

La disposition d'un testament par laquelle, après avoir légué une partie de ses biens à un individu le testateur ajoute, "Je lui remets tout le reste de mes biens pour en disposer comme il sait, et que je lui ai dit de vive voix, ou que je lui noterai par écrit, m'en rapportant à sa conscience pour cela," est nulle, comme faite à une personne incertaine et ne contenant pas la manifestation suffisante de la volonté du testateur. *Strey's Code Nap.* 1 vol. art. 895 no. 12.

And another at Limoges;—

Le legs fait au profit d'un individu pour exécuter les intentions secrètes du testateur, doit être annulé comme ne désignant le véritable légataire. En conséquence le légataire apparent est tenu de restituer tout ce qu'il a reçu, dans ce but, du testateur. *Rep. Gen. tome 9. verbo Legs* p. 48 no. 35.

And another at Metz;—

La disposition par laquelle le testateur lègue le tiers de ses biens à

Maduel, Executor, et al. vs. Tuyes et al.

l'église ou au séminaire, à la volonté du légataire désigné dans le testament n'est pas valable. *Ibid.* no. 36.

The object Caballero had in view was legitimate, and the heir could not have successfully resisted the accomplishment of his purpose, had he sought to effect it in the mode permitted by the Code. He attempted to do in a clandestine way what he need not have been ashamed to do before the eyes of the world, and to accomplish by secret instructions what he might have done by an open and explicit declaration in a notarial Act, or by last will, and the nullity of his 'instructions' is the penalty of his mistake.

Judgment affirmed.

Rehearing refused.

No. 6847.

THE STATE VS. A. DEPASS AND ALFRED BAPTISTE.

A party may be charged in separate counts, in one information, of larceny and burglary. Such an information is not vicious on the score of duplicity. Neither the fact that two offenses are not embraced or denounced in the same statute, nor that they have no necessary connection or similarity, will prevent them from being charged, on separate counts, in a single information. The pleadings and mode of procedure of criminal prosecutions in England obtain in Louisiana, in virtue of a special statute to that effect.

A PPEAL from the Superior Criminal Court, parish of Orleans. *Whitaker, J.*

H. N. Ogden, Attorney General, for the State.

Cullom & Castellanos for defendants and appellants.

The opinion of the court was delivered by

MANNING, C. J. The defendants are jointly charged with the crimes of burglary and larceny, each crime being charged in a separate count of the information. Upon conviction, they were sentenced to hard labour for a term of years, and Depass appealed.

It may be well to note in the outset, that this case differs from *Ford's*, 30 Annual, 311, in this—that in that case, the indictment was for burglary alone, and contained but one count, and a conviction of larceny under it was held bad.

The appellant relies for reversal upon a motion in arrest of judgment for this cause;—"That the indictment (information) upon which he was convicted is, upon its face, a nullity, and all proceedings thereon are necessarily void. That it contains two counts for distinct and separate offences, and therefore is insufficient for duplicity. That these

offences are neither embraced in, nor denounced by the same statute, and have no necessary connection or similarity, one with the other."

The contrary has been expressly and often decided, and in one of the cases, the identical question as to the two identical crimes here charged was presented. "Burglary and larceny may be joined in the same indictment under different counts." *Baker v. State*, 4 Ark. 58. A court of very high authority thus dismisses a similar objection to that now urged;—"It is every day's practice to charge a felony in different ways in several counts for the purpose of meeting the evidence as it may come out upon the trial; each of the counts on the face of the indictment purports to be for a distinct and separate offence, and the jury very frequently find a general verdict on all the counts, although only one offence is proved, but no one ever supposed that formed a ground for arresting the judgment." *Kane v. People*, 8 Wend. 203. *People v. Austin*, 1 Parker Crim. 154. Another court of equal repute, considering a case, similar to this, where the first count charged burglary and the second simple larceny, and objection was made that they were distinct substantive offences, and could not be included in the same indictment, said it was common in practice, and there was no objection to it. *Carlton v. Com.* 5 Mete. 532. *Com. v. Tuck*, 20 Pick. 356.

The information is not then vicious for duplicity. The other ground is, that the two offences are neither embraced in, nor denounced by the same statute, and have no necessary connection or similarity. The circumstance of inclusion in the same statute cannot be the test of legal joinder, for if that were true, all the crimes embraced in the celebrated Act of May 4, 1805, could be included in the same indictment; and as that Act embraced every crime which thereafter was punishable by our law, it would be equivalent to saying that all crimes, of whatever nature or degree, can be included in the same indictment—a proposition, the reverse of that which the defendant's counsel are seeking to maintain.

We suspect the latent idea in the mind of the mover in arrest is shadowed in the clause, that the two crimes "have no necessary connection or similarity," by which we will assume is meant, that they are not of the same generic class, and do not belong to the same family. *Ford's case*, *ut supra*.

The objection is misapplied. A conviction of larceny under an indictment for burglary alone is bad, because to justify a conviction of a lesser crime under a charge of a greater, the two must be so related that the greater necessarily includes the less, as murder includes manslaughter. If therefore there were but one count in this information, and it was for burglary alone, a conviction of larceny would be reversed for error. *Dinkey v. Com.* 5 Harris, 126 as to convictions of lesser offences under charge of greater.

State vs. Depass and Baptiste.

But two distinct offences may be charged in separate counts, and a conviction of either is unquestionably regular. Nor is it necessary that they should be of the same class, in order to justify their location in the same indictment, provided each is placed in a separate count. Bishop Crim. Prac. § 189 *et seq.*

The rule, that a joinder in one count of two distinct offences is bad, has exceptions; and this crime of burglary furnishes an illustration of them, for in England the chief exceptions are in indictments for that crime. In Tuck's case from Pickering, cited above, the ruling was that a count, charging that the defendant broke and entered into a shop with intent to commit a larceny, and did then and there commit a larceny, is not bad for duplicity. If then in indictments for burglary, there may be joined a charge of burglary and a charge of larceny in the same count, how much more can these two charges be made in two separate counts?

The defendant's counsel admit that such is the practice, and that "numberless decisions to that effect" are in the books, but argue that "we must distinguish. What is good pleading there (in England and the other States) may not be good pleading here. We must not lose sight of the important fact that, since 1805 Louisiana has cast off the shackles of the common and statutory law of England."

The pleading and mode of procedure of criminal prosecutions in England is the special feature in that system that we have retained. That is the one particular shackle that Louisiana did not cast off. The Act of 1805 enacted that thereafter the great mass of offences, known and recognised as such by the common law, should not exist in this State, and that only such acts as were declared to be criminal by that, and other statutes of this State, should be deemed criminal. And it proceeded in numerous sections to declare what were crimes, and to affix punishments to their commission. It was soon found that the list was altogether too short, and in 1817 many others were added, and more since. Instead of defining these crimes, it adopted the definitions that obtained in English law, and then by a sweeping clause provided that the "forms of indictment, the method of trial, the rules of evidence, and all other proceedings whatsoever in the prosecution of the said crimes, offences, and misdemeanours, changing what ought to be changed, shall be, except as is by this act otherwise provided, according to the said common law." Sec. 33.

The common law authorities upon all questions of procedure in criminal prosecutions are therefore our only guides in such matters. *State v. Smith*, 30 Annual, 846 where this subject is elaborately discussed and settled.

Judgment affirmed.

No. 5849.

ELLEN MURRAY VS. PONTCHARTRAIN RAILROAD COMPANY.

Where in a suit for damages against a railway company on account of injuries caused by a collision it appears that the negligence of the injured party contributed to, and was mainly the cause of the disaster, no recovery can be had by him or his legal representatives, even though it be in evidence that the servants of the company were in some degree to blame for the accident.

A PPEAL from the Superior District Court, parish of Orleans. *Hawkins, J.*

A. J. Lewis for plaintiff and appellee.

Jno. A. Campbell and *A. Micou* for defendant and appellant.

The opinion of the court was delivered by

MANNING, C. J. Morris Murray was killed by a collision of his bread-cart, which he was driving, with a train on the Pontchartrain Railroad on September 27, 1874, and the plaintiff in the double capacity of his widow, and tutrix of his children, sues for twenty five thousand dollars as damages. The case was tried by a jury who gave ten thousand five hundred dollars, for which sum judgment was rendered.

The train was *en route* from the lake to its depot, and was passing up Elysian Fields street. The track is perfectly straight, and any one, at the point of collision on that street, can see the train approaching from the lake, which is four miles distant. Elysian Fields street, like Canal, has a middle ground with a street on either side. It is a double street. The Pontchartrain rail-track is on this middle ground. On one of these side streets, the Canal & Claiborne street railway has a track for its horse cars, which runs parrallel with the Pontchartrain track for some distance, but turns abruptly before it reaches Goodchildren street, and crosses the Pontchartrain track at a right angle. This crossing is sixty-two feet from Goodchildren street. It was there the collision occurred.

The railroad train is due at this point at 5.20 A. M. It reached there on that morning punctually. Murray was driving his cart on Elysian Fields street—on that side street, whereon the Canal & Claiborne track is laid—and was driving on that track. His route was parrallel with that of the Pontchartrain road. His cart and the train were going in the same direction. The view from the one to the other was unobstructed by houses or trees—was unobstructed by anything except his cart-cover, which closed in the sides as well as the top, and projected a little in front from the top. His wife was with him in the cart. They left home for the market at 4.40 A. M. by the time of their clock, and reached the crossing in a few minutes, and as they thought they were thus nearly forty minutes ahead of the time for the railway train,

Murray vs. Pontchartrain Railroad Company.

were not expecting it. They saw nothing, and heard nothing. As the cart reached the point of crossing, and wheeled horizontally to the railway track, Murray exclaimed, 'the steam cars are on us,' and in an instant the horse plunged and was hurled aside, the cart broken, and Mr. and Mrs. Murray thrown out. He was killed. She was only a little hurt, and the horse not at all.

The railroad time guided the movements of the train, and numerous witnesses attest its correctness. The train was there at 5.20 on that morning. The clock of the unfortunate man was wrong. The time it marked for him deceived and misled him. He reached the crossing at the moment the train was due, and his life paid the forfeit of his error.

The doctrine of contributory negligence is now imbedded in our jurisprudence, and is recognized and applied in all the States, and by the national courts. It was applied by this court in an early case wherein this company was defendant, *Lesseps v. Pontchartrain R. R.*, 17 La. 361, and has recently been recognized, unimpaired in vigour and completeness. *Schwartz v. Crescent City Railroad Co.*, 30 Annual, 15. The U. S. Supreme court have had occasion lately to consider how far such negligence relieves a railroad company from responsibility where, as in this case, it was urged that the company had omitted the precautions which should have been taken to avoid the collision, and have held that negligence of the company's employees is no excuse for negligence on the part of the person injured. *Chicago & R. I. Railroad Co. v. Houston*, 5 Otto, 697.

The city regulations require a slackening of speed to three miles an hour, and ringing the bell, at Good Children street. The defendant's witnesses say the speed of the train was in conformity to this regulation, and the warning of its approach was duly given. The plaintiff charges that the speed was 'furious,' and that the collision is attributable to the negligence of the company in not providing proper equipment of the road, by means of which the train could have been stopped. Proper brakes, and enough men to work them, and ordinary circumspection, she alleges, would have enabled the company's employees to have stopped the train in time.

Grant all that is contended for in this respect by the plaintiff. The negligence of the deceased contributed to, and was mainly the cause of the disaster. It was three-fold. The mistake as to the hour was occasioned by his implicit reliance on the correctness of his own time piece, in regulating his starting, but he was made aware of its incorrectness while *en route* by meeting a horse-car on the Canal & Claiborne road, which does not commence running until 5 o'clock, and the inability to see the train was solely due to the cart-cover, which shut out the view completely. Surely, the defendant is not to be mulcted in damages be-

cause the deceased had a disordered clock, and drove in a cart which excluded the view from either side; for it is manifest that if he had known the time, he must have expected the train at that moment, or if he had not been unable to look without his own vehicle, he must have seen the train approaching. His course was parallel with the train. If he had gone forward sixty-two feet farther, he could have crossed at Good Children street safely, as the train would have shot by, but he was on the horse-car track of the Claiborne road for his own convenience. It curved sixty-two feet from Good Children street. He chose to pursue that track, instead of keeping on the bed of Elysian Fields street, and turning into the street just ahead of him. He turned out of the public highway (Elysian Fields street), and crossed the middle ground, not through or on another public highway (Good Children street), but over a place which could not be traversed by a vehicle, except by keeping on the horse-car track. He had no right to be where he was, when he met his death. He took no care nor precaution whatever. Any one crossing a railroad track is bound to use his senses—to look and to listen—before he may prudently venture across, and if the deceased had either looked or listened, he would have seen and heard the approaching train.

No recovery can be had for injuries suffered by one who, without looking carefully along the track of a railroad, walks across or along it, and is run over by a train. *Steerman & Redfield on Negligence*, § 40. It is culpable negligence to attempt to drive a team across the track of a railroad in full view of an approaching train, on account of the risk of becoming entangled in the rails, even where there is apparently time to cross. *Ibid.* § 489. It is settled, says the court of New York, that the law requires a vigilant use of eyes in looking, and the ears in hearing, upon approaching a highway crossing, to ascertain whether there is a train approaching, and that if by a vigilant use of these faculties while approaching the crossing, the vicinity of such a train may be discovered in time to avoid a collision therewith, the omission to exercise them, and thus avoid an injury, is such negligence as will bar recovery therefor, although the railroad may have been guilty of negligence contributing thereto. *Davis v. Cen. & Har. R. R.* 47 N. Y. 402. Aside from the fact of the accident happening on the defendant's own property, where the sufferer had no right to be, the failure of the engineer to sound the whistle or ring the bell, if such were the fact, did not relieve the deceased from the necessity of taking ordinary precautions for his safety. *Chicago R. R. v. Houston*, 5 Otto, 697. The middle ground of Elysian Fields street, unlike that of Canal and other streets of the same configuration, is the private property of this Railroad Company. It cannot be crossed by vehicles, except where streets cross it, only at the point where the Canal and Claiborne horse-car track crosses it, and it

Murray vs. Pontchartrain Railroad Company.

cannot be crossed there by vehicles except by using the horse-car track. The deceased seems to have presented a case, in which every element of contributory negligence is furnished by his own conduct.

The jury must have been misled by the charge of the judge, which was erroneous. It was, that if the accident occurred without wanton negligence of the Company, but through simple negligence, the jury was authorized to give exemplary and vindictive damages, but if the accident was unavoidable, and was not the result of the Company's carelessness or negligence, then only actual damages could be given. We shall set aside the verdict rendered under such instructions.

It is ordered and decreed that the verdict of the jury is set aside, and the judgment rendered thereon is avoiled and reversed, and it is now decreed that there be judgment in favour of the defendant and against the plaintiff upon her demand, and that the defendant recover of the plaintiff its costs in the lower court, and the costs of appeal.

Rehearing refused.

No. 7437.

HYPOLITE CESTAC VS. WIDOW FLORANE.

A widow who mortgages her undivided half of a certain piece of community property thereby accepts the community.

The widow in community can not, while the succession is still under administration, and before its debts are paid and her residuary interest thus definitely ascertained, execute a valid mortgage on her undivided half of any specific property of the succession. Where such a mortgage is sought to be executed by the mortgage creditor, the heirs are entitled to enjoin its execution.

A PPEAL from the Sixth District Court, parish of Orleans. *Rightor,*
J.

Frank D. Chretien for plaintiff and appellee.

A. & W. Voorhies for defendant and appellant.

The opinion of the court was delivered by

MANNING, C. J. Michel Florane died in August 1870, leaving a will, a widow, and nine children, six of whom were minors. All the property was community. The testator devised to his widow the usufruct of his property, and appointed her executrix. She qualified, and was also confirmed natural tutrix to the minors.

In December 1871, the widow, as executrix and tutrix, petitioned the court for a sale of the property, or of so much thereof as is necessary to pay over four thousand dollars of debts, and the costs and charges, and prayed a convocation of a family meeting to advise touching the sale of the minors' interests, and prescribe the terms of sale. The meeting was held, the terms of sale prescribed, the sale ordered, and fifty-six lots of ground in New Orleans were sold in February 1872, and realized six thousand seven hundred and fifty dollars. The terms

of sale were one third cash, and the residue on one and two years' credit.

On February 15, 1873, just as the first note had matured, B. & A. Soulié, alleging that they were creditors of the succession for \$525 principal, prayed that the executrix be ordered to give security, and the order was granted. They also alleged that more than a year had elapsed since her qualification, and that no account had been rendered by her, and prayed that she be ordered to file an account in ten days, and that order was made. We hear no more of these creditors, or of their claim, nor was any account filed. But a few days afterwards, on February 26th., Mrs. Florane borrowed of John Shrepfer five hundred and sixty dollars, and mortgaged to him an undivided half of a piece of ground, and on the 24th. of August 1875, she executed to Cestac, the plaintiff, her note for one thousand dollars, and a mortgage on an undivided half of six half-squares of ground in this city, which belonged to her, the Act recites, "as having been common in goods with her late husband."

In 1878 this note had been reduced to \$910, and Cestac then sued out executory process for the foreclosure of his mortgage, when his proceedings were arrested by an injunction of Mrs. Florane, in her capacities of executrix of her husband and tutrix of her minor children, and by all the major heirs of the husband. They allege that the succession of Michel Florane is the owner of these six half squares, and that Cestac is about to have an undivided half of them sold under his mortgage—that they are still under administration in the Second Court of Orleans—that there has never been a partition of the succession, or any part thereof, between the widow in community and the heirs, and the executrix has not made any settlement of her administration, and therefore the seizure is illegal.

The defendant in injunction excepted that no cause of action was shewn, and no interest in the subject matter of the suit, and reserving the exception, answered by a general denial, and a special averment that the undivided half of the seized property was not under administration.

There has never been any account filed, and consequently the record does not shew what the executrix has done with the proceeds of sale of the fifty-six lots. Neither does it shew any action of the succession creditors, except that we have noticed. The whole inventory is only \$5,102.50. The last paper filed by the executrix in the succession was on May 3, 1876. She had executed the mortgage to Cestac fourteen months before.

The heirs of the succession raise the questions, whether the executrix, who is also widow in community, can validly mortgage an undivided half of any specific property of the succession, and whether the

mortgage creditor can foreclose his mortgage, while the administration is pending, and sell absolutely an undivided half of the property without regard to the ultimate rights of the heirs.

Upon the dissolution of the community by the death of one of the spouses, the survivor becomes owner of half of the community property, subject to acceptance or renunciation, which may be express or implied. Unquestionably, the widow Florane accepted the community by mortgaging an immovable, this being one of the instances of implied acceptance given by writers as illustrative of the manner in which an acceptance is implied or tacit. Si elle hypothéquait un immeuble, ou constituait une servitude sur un bien dépendant de la communauté. 2 Bellot, 206.

But while a succession is under administration, the widow in community and the heirs have no right to interfere with it, and have nothing to claim until the debts are paid, and the administration has legally terminated. Suc. Ogden, 10 Rob. 457. And there must be an administration when there are debts of the deceased to be paid, and a part of the heirs are minors, who could only accept with benefit of inventory. Civil Code, art. 1034 new no. 1041. It is true, even after administration is granted, beneficiary heirs, if not opposed by creditors, may take charge of and administer the property before the administration is entirely completed, if put in possession thereof legally, and these beneficiary heirs may be sued by a creditor of the succession. Soye v. Price, 30 Annual, 93. But the succession, so long as it exists, is an entirety. As an ideal being, it takes the place as it were of the deceased, and so far as proprietary right is concerned, it is a prolongation of that of the deceased owner.

The proprietary interest of a widow in community is necessarily contingent. She owns one half of the residuum after the debts are paid. Until the debts are paid, it cannot be certainly known whether there will be any residuum, or if any, what portions of the property will remain to constitute that residuum. How then can she pick out a particular piece of property, or several pieces, and assuming that the sale of it or them will not be necessary to pay the debts, appropriate an undivided half to herself, and mortgage it as her own absolutely?

The plaintiff argues that since the widow becomes responsible for half of the debts by accepting the community, she is also absolute owner of one half of the property. This is a *non sequitur*. Her acceptance gives to the creditors two securities—that of the succession property, and that of her own. Because she becomes liable by acceptance to pay one half of the debts, it does not follow that the creditor loses his primary right against the succession property.

Nor can the law intend that where a person holds property in sev-

eral capacities—for instance as widow in community, as executrix, and as tutrix—she can alienate it in one capacity to the detriment of the others. It is no answer to say that she alienates as executrix when she sells for the payment of debts. That is not her voluntary alienation, but an alienation in which she is but an instrument of the law. The creditor is not hurt by such alienation, for it is made to pay him. The heir is not hurt, for like the widow in community, he is entitled only to what is left after the debts are paid.

This case is almost identical with *Hickman v. Thompson*, 24 Annual, 264 and 26 Annual, 260. There as here, the widow had apparently used succession funds and had not accounted for them, and had mortgaged an undivided half of property belonging to an unsettled community for her individual debt, and it was held that as creditors had not complained, the heir could not. This is placing minor heirs at the mercy of an improvident executrix, or widow in community. In our opinion, so far from the heir being compelled to stand by and witness the spoliation of his heritage, it is the manifest and imperative duty of those who represent minor heirs to arrest a sale of the property of an unsettled succession, about to be made to pay the individual debt of an executrix or widow in community, and to delay it until the administration is forced to its end, and the rights both of the widow in community and the heirs are definitely ascertained. The major heirs may interfere or not as suits their pleasure, but they who have minor's interests in charge cannot use their own option. And to inflict damages upon the minors, through their representative, for the attempt to protect their rights, as was done in this case and in that cited, is to add to the injury inflicted by an improvident executrix or widow in community, another injury inflicted through the medium of a court.

Mrs. Florane could not mortgage a particular immovable of the succession for her own debt. She cannot select any specific piece of property, and by her own volition make an undivided half of it her own, and thus convert her previous ownership into an absolute and indefeasible title. The heir, as well as the creditor, is entitled to have the administration of the succession, as an entirety, completed. *Non constat* but that the widow has already received her full half of the entire succession, and if a mortgage given by her upon parts of its remaining property were held good, and the property alienated by its foreclosure, the heir would be denuded of his inheritance. Therefore

It is ordered, adjudged, and decreed that the judgment of the lower court is avoided and reversed, and it is now decreed that the injunction of the heirs, both major and minor, is maintained and perpetuated, and they have judgment against the plaintiff for their costs in the lower court, and for those of the appeal.

No. 7315.

J. W. BLACK VS. GOOD INTENT TOW-BOAT COMPANY.

The writ of injunction will issue on the *ex parte* application of the complainant, only in its prohibitory or remedial form; as in cases where the only purpose to be accomplished is to restrain, or prohibit something from being done. But in its mandatory form, when it commands the doing of something, it can not be issued until a hearing on the merits; or when, a prohibitory writ having issued, restraining a party from obstructing the exercise of a right, the obstruction may be commanded to be removed because its continuance effects the very injury he was prohibited from effecting.

A PPEAL from the Fifth District Court, parish of Orleans. *Rogers, J.*

Hornor & Benedict and *Henry C. Miller* for plaintiff and appellant.
James McConnell for defendant and appellee.

The opinion of the court was delivered by

MANNING, C. J. This case presents a question not hitherto settled by our jurisprudence, i. e. should a mandatory injunction issue upon a preliminary motion or application?

There are two forms or kinds of injunction employed by English and American courts of equity, the most common form being that which operates as a restraint upon a party in the exercise of his real or supposed rights, and the other, commanding an act to be done. The first is sometimes called the remedial writ, and the second the judicial writ; because it issues after a decree. 2 Story Eq. Jur. § 861. With us, the definition of the writ is statutory;—injunction, or prohibition is a mandate obtained from a court by a plaintiff, prohibiting one from doing an act which he contends may be injurious to him, or impair a right which he claims. Code Prac. art. 296.

The plaintiff is the owner of tow-boats, and is engaged in the business of towing vessels back and forth from the gulf to this City. In the prosecution of his business, it is often necessary and always useful to communicate by telegraph with the Passes of the Mississippi river. The defendant is an incorporated company, established to conduct the business of towing vessels to and from the gulf hither, and was empowered to build or buy steam tow-boats, and to purchase, or build, or establish a telegraph line between this City and the Passes. The company built the line, and for many years it was open to the public, any one sending dispatches over it at pleasure on paying the rates. The plaintiff thus used it, but for some cause his dispatches were refused transmission a year ago, and in May 1878 he brought this suit. His prayer is, that a writ of injunction issue, commanding the defendant company to receive and transmit by magnetic telegraph over its telegraph line between this City and the Passes, all messages from or to

him, offered to be transmitted, on the payment of the usual rates of compensation, and that after due proceedings had, the writ be made peremptory.

The defendant construes the use of the disjunctive in our definition of the writ—'injunction or prohibition is a mandate'—as explanatory of its nature, so that the word 'prohibition' shall be considered as a definition of 'injunction,' and as having been used to indicate the kind of writ which the Code adopts, thus restricting our statutory writ to one of those known in Equity practice. We are not inclined to adopt a construction which may shut us off from sources of relief that ought to be open to us, and particularly when it is based on the use of a single word, not intended apparently to have such broad significance. This court early declared that the writ is as effective in enforcing a right as in preventing a wrong. *McDonough v. Calloway*, 7 Rob. 442.

In that case, the plaintiff alleged that the defendant had wrongfully fenced up an alley way between their lots, which was common to both, and prayed the court to order the obstruction removed, and that an injunction should issue, commanding the defendant not to disturb him in the free use and enjoyment of the common way. The judge gave an order simply enjoining the defendant from disturbing the plaintiff in the use of the alley, and several days afterwards, the plaintiff made an affidavit, and asked for a rule on the defendant to shew cause why he should not be punished for contempt, and why the obstructions should not be immediately pulled down. Upon the hearing of this rule, the judge said, it appeared the defendant had done no act since his injunction, but had quietly permitted the fence to stand, and as the writ was a preventive one, the defendants had not been guilty of any contempt, and as to ordering the obstructions to be demolished, that he could not do so until he heard the parties on the merits. On appeal, the point was made, that injunction is not the proper remedy when the object is to direct a party to perform a particular act; and that if it be, the order cannot be made, to the extent required, before hearing the parties on the merits, and this court said;—the law has not left parties remediless in such cases, nor the courts powerless for the correction of such evils. The judge below should at once have granted an order to have the obstruction removed by the sheriff.

It is claimed by the defendant that this case only shews that cases may arise of extreme necessity, in which our courts will enforce their authority or decrees by the mandatory writ of injunction; but it certainly shews that the issuing of such writ was considered within the competency of our courts. As it is the only authoritative case on that question, it becomes necessary to determine whether we will maintain that construction, and to what extent.

Since we do not administer law and equity in separate courts, it is essential, in interpreting the articles of the Code of Practice that treat of the writs, peculiar to equity jurisdiction, to give such effect to them as will make the writs effectual remedies, so far as this can be done without running counter to the express language of the Code. Resort is often had to the decisions of Equity courts in making this interpretation, controlled by the fact that our remedies are statutory, and can only be used for the purposes indicated; but we should not be justified in going beyond the application of those remedies made by Equity courts, and recognised therein as sufficiently comprehensive to attain complete relief.

The history of the question now before us in the Chancery courts of England has been correctly and fully epitomised in a recent case, which reviewed all the decisions from the earliest in Vesey down to *Heracy v. Smith* decided by Sir Page Wood V. C. afterwards Lord Chancellor Hatherley, and the court summed up the investigation by saying;—there are cases in which mandatory injunctions have been ordered on motion, (equivalent to our granting the writ on *prima facie* shewing) but they are all, or nearly all, cases in which some erection, placed and maintained by the defendant to effect the injury complained of, was ordered to be removed, or its maintenance forbidden, on the ground that the defendant effected the act he was restrained from doing by continuing such erection. *Rogers Locomotive and Machine Works v. Erie R. Co.*, 20 N. J. Eq. 379. And that was precisely the *McDonough* case. Calloway effected the obstruction of the alley, which he was restrained from doing, by continuing the erection which caused the obstruction. Further on in the same case the New Jersey court say;—A number of authorities and cases were cited on the argument to shew that courts of equity will, in certain cases, decree the restitution of particular chattels. But these are all cases where it was so ordered upon final hearing. There is no case of any interlocutory injunction being granted, or even applied for, for such purpose.

The farthest we feel authorized to go is to hold that the writ of injunction, in the prohibitory or remedial form, can alone be issued on the *ex parte* application of the complainant, and this the more, since the issuing of the writ is not with us matter of discretion, but of compulsion, when the applicant for it complies with the requirements of the Code of Practice, by presenting a petition which on its face sets out a legal cause for the writ, and fortifies it by his oath, and gives bond. *Beebe v. Guinault*, 29 Annual, 795. The writ in the mandatory form cannot be issued until a hearing on the merits, when it is a judicial writ and is used to enforce a decree; or when, a prohibitory writ having issued, restraining a party from obstructing the exercise of a right, the obstruc-

tion may be commanded to be removed because its continuance effects the very injury he was prohibited from effecting.

This appeal is from a judgment setting aside the injunction obtained *ex parte*, the trial having been only on the exception and motion to dissolve, and the lower judge presents the question he decided thus;—whether on the face of an application, such as the present, there is a warrant in law to issue *in limine* the injunction granted in this case; or in other words, is it lawful under our law and jurisprudence to issue a mandatory injunction before a trial upon the issues of the controversy?

His judgment answered that question negatively.

Judgment affirmed.

No. 7287.

THOS. S. ELDER VS. CITY OF NEW ORLEANS ET AL.

It is not necessary that the name of the clerk of the lower court should appear in the body of the transcript of appeal. His signature thereto is sufficient.

Where a formal agreement between counsel has been made as to what shall be included in a transcript of appeal, the clerk's certificate that the transcript contains all the documents, records, etc., required by the agreement, will be sufficient.

The lower court fixes the return day of an appeal, and hence if it is erroneously fixed, the error can not prejudice the appellant.

The principal and surety on an injunction bond, who, on the dissolution of the injunction, have been condemned *in solido* for a certain sum, may unite and give but one appeal bond, with a surety who binds himself "for both and for either," in the sum fixed by the court.

Where the appellant gives bond in the amount fixed by the court, the appeal can not be dismissed on the ground that the amount is insufficient.

Where an injunction issues to restrain the sale of property worth over \$700, coupled with a demand for damages for a large amount, this court will have jurisdiction of an appeal from the judgment dissolving the injunction.

The affidavit of a party praying for an injunction that "all the facts above set forth as bases of an injunction, and reasons why an injunction should issue are true and correct" is insufficient.

It is only when an injunction has been taken to restrain the execution of a money judgment, that the principal and surety on the bond may be summarily condemned *in solido*.

The publication of the notice to delinquent taxpayers made by the Administrator of Finance of the city of New Orleans in virtue of Act 48 of the Legislature of 1871, stands in lieu of citation, and just as effectively brings the parties into court.

The right of a judge presiding in a court, and *de facto* discharging the duties of that office, can not be collaterally questioned by litigants therein.

The reception of secondary or illegal evidence in proof of a fact is no ground to annul a judgment upon, when the evidence was not objected to.

Under a judgment and execution for taxes the first writ of *fi. fa.* issued in the case continues in force until finally satisfied.

In the parish of Orleans the seizure of property under a *fi. fa.* issued in execution of a judgment for taxes is constructive. It takes effect by merely recording the notice of seizure in the mortgage office, and such seizure can not be affected by an omission of the sheriff to state on his return the "date and hour" of the registry of the notice.

In the absence of contrary proof it will be presumed that the sheriff properly recorded the notice of seizure in the mortgage office.

It is a sufficient description of property seized and sold under a judgment for taxes that it is situated in a certain district, and square, bounded by four certain streets, and measures so many feet in depth by so many feet in width.

A PPEAL from the Third District Court, parish of Orleans. *Monroe, J.*

McGloin & Nixon for plaintiff and appellant.

Sam. P. Blanc, Assistant City Attorney, for the city, defendant and appellee.

Henry Denis for Mrs. Adams, defendant and appellee.

ON MOTION TO DISMISS.

The opinion of the court was delivered by

SPENCER, J. Appellee moves to dismiss this appeal on six grounds.

The first, second, and third grounds may be disposed of in the main by saying that the irregularities complained of are fully covered by the argument of counsel, shown by the record, and the documents filed by appellant on fourth January, 1879. All the papers not excluded by that agreement seem to be in the record, and in that of State ex rel. Elder vs. Judge Third District Court, No. 6846. The transcript was filed in time under said agreements.

It is not necessary that the clerk's name should appear in the body of his certificate. His signature thereto is sufficient.

He certifies that the transcript contains all documents, records, etc., required by the written agreement of counsel. That was sufficient in a case where, like this, the counsel had made a formal agreement on the subject.

The fourth ground is that the appeal should have been returnable third Monday of May instead of first Monday of November. Appellant moves for the appeal, and the court fixes the return day thereof. If the court erred, appellant can not be prejudiced thereby.

The fifth ground is that the bond for a suspensive appeal, from the judgment dissolving the injunction, is defective and insufficient in amount. The judgment is for \$100 damages and costs. The court fixed the bond at \$250. When the appellant gives bond for the amount fixed by the court, the appeal can not be dismissed. If it be a money judgment, the law fixes the amount for suspensive appeal. The judgment

was one in *solido* against plaintiff and the surety on his injunction bond. They appealed by joint motion in open court, and gave one bond with a surety who bound himself for \$250 "for both and for either" of the principals.

We know no law or reason why two persons condemned in *solido* in the same judgment should give separate bonds. If the surety be for both of them, and for each of them, and binds himself to pay the amount required, it is sufficient.

The condition of the bond in this case is that prescribed by the Code of Practice.

The sixth ground is that the amount involved is not within the jurisdiction of this court.

Plaintiff's petition alleges in substance that the city of New Orleans caused to be entered up against him, without citation or notice, and without default, a pretended judgment for \$175 for taxes; that it caused to be issued thereon a pretended writ of *feri facias*, which was illegal upon its face, and caused a pretended sale of his property to be made, without having made any seizure thereof, and without having given him any notice; that he was entitled to redeem said property, and by way of compromise tendered the necessary amount to the purchaser, Mrs. Adams; that the judgment and the sale are therefore absolute nullities; that the sheriff, the purchaser, and the city are threatening to dispossess him under said void proceedings. He therefore prays an injunction restraining them, and for judgment against them declaring the nullity of said judgment, and of said sale, and for \$3000 damages for disturbing him, etc. It is alleged and admitted that the property is worth over \$500—in fact, several thousand dollars. Appellee relies on the case of *Cushing vs. Sambola & Ducros*, 30 An. 426, and the cases there cited, and others to same effect.

But that case does not meet all the issues in this case. We there held that an action to annul a judgment for less than \$500, between the parties to such judgment, could not be brought within our jurisdiction by alleging damages to a greater amount as consequence of its execution. There is involved in this suit a demand to annul the sheriff's sale, for matter subsequent to and independent of the judgment, and for damages to a large amount, resulting from his alleged acts. This state of facts brings the case within the jurisdiction of this court. Whether the plaintiff can inquire into the judgment itself, will be a subject of inquiry when the case comes before us for trial, and we need express no opinion thereon at present.

The motion to dismiss is overruled.

ON THE MERITS.

Plaintiff sues to annul, first, a judgment of the Superior District Court rendered against him in 1874 for taxes due the city of New Orleans; second, a sheriff sale, under execution of said judgment, whereby a square of ground in this city was adjudicated to Mrs. C. Adams, Jr.

He alleges that the sheriff is about to put Mrs. Adams in possession under an order of court. He, therefore, asked and obtained an injunction restraining said parties from interfering with his possession.

Defendant moved to dissolve this injunction, with damages, on several grounds, one of which was insufficiency of the affidavit. The court sustained the motion and dissolved the injunction, with \$100 damages, against principal and surety *in solido*. Plaintiff appeals from said decree.

The case was then tried on its merits, and there was judgment dismissing plaintiff's suit. From this final judgment plaintiff also appeals.

Plaintiff's petition alleges various grounds of nullity against the judgment and sale, and that the sheriff is about to and will execute a deed to Mrs. Adams, and is about to and will dispossess petitioner and place said purchaser in possession, unless enjoined. The oath is as follows :

"That all the facts above set forth as basis of an injunction, and reasons why an injunction should issue, are true and correct."

It is manifest that such an affidavit is insufficient. It can not be positively affirmed of *any fact stated* in the petition that *it is sworn to*. What facts are or are not considered to be *basis and reasons* for injunction, is left to conjecture, argument and inference. The oath must be positive. The rule is well stated in *Herbert vs. Joly*, 5 La. p. 52, by Chief Justice Martin: "The oath should be direct, positive, and unconditional." See, also, 5 La. 82; 3 An. 225. The injunction was properly dissolved; but we do not think that damages could be, in such case as this, summarily awarded. It is where the injunction is taken to restrain the execution of money judgments, that the principal and surety may be summarily condemned *in solido*. R. S.

This is not such a case. Indeed, there is no law making the surety in such case as this a party to the suit. The right of defendant for damages upon the bond should have been reserved.

On the merits, the grounds of nullity against the judgment are, first, want of citation; second, incompetency of the judge; third, that there was not legal proof of publication of the notices to delinquents prior to confirming default.

The judgment sought to be annulled recites that there was "due proof of the publication required by law." Under the law (sec. 21 of the

Elder vs. City of New Orleans et al.

city charter, act No. 7 of extra session of 1870) this publication stands in lieu of citation. Aside from the presumption of law, there was positive proof that this publication was made in the official journal for thirty days, as required. The publication was made three times during the thirty days, in conformity to section nine, act 48 of 1871. We see no reason to doubt the authority of the Legislature to confer the power to make this publication upon the Administrator of Finance. It is not a judicial act, and the Legislature may require it to be done, as well by that officer as by the clerk or sheriff. The citation was sufficient.

The second ground is that Jacob Hawkins, the judge presiding in the Superior District Court, was appointed to said office, and not elected as required by the constitution. This might be a good ground for his removal in a proper action brought for that purpose. The right of the judge presiding in a court, and *de facto* discharging the duties of that office, can not be collaterally questioned by litigants therein, more especially in proceedings to which he is no party.

The third ground is in substance that the proof of publication was not that required by law, and he cites R. S. section twenty-six, which directs the State Printer to make affidavit to the publication. Even if that section referred to other than publications made by order of court, the fact of publication could be proved by other evidence if not objected to. The reception of secondary or illegal evidence in proof of a fact is no ground to annul a judgment upon. Such evidence should have been objected to when offered. This is elementary.

The grounds upon which the sale is attacked are—

First—That the writ of *fi. fa.* had no return day fixed therein.

Second—That there was no lawful seizure of the property, or return thereof.

Third—That there was no notice of seizure.

Fourth—No lawful description of the property seized and sold.

The first ground is abandoned, except that it is contended the sheriff made the sale under an expired writ. We have held, on more than one occasion, that the eighth section of act 85 of 1858 was in force still, and that under "judgment and execution for taxes," "no *alias* or *pluries* writ shall be issued, but the first writ shall continue in force until finally satisfied." *Marin vs. Sheriff*, 30 An. 295. That act is not repealed by the general law found in the R. S. on the subject of return of writs. It is not on the same subject matter, and relates to the *special matter of writs on tax judgments*.

Second—In the parish of Orleans the seizure is constructive, and results from the recordation of the notice of seizure in the mortgage office. The sheriff in his return on the writ certifies that he "caused the said notice of seizure to be duly recorded in the office of the Re-

corder of Mortgages." This recordation was itself the seizure. It was a fact, an act. The sheriff is directed to make out three notices of seizure—one for the debtor, one for registry, and a third one for his return. It directs him on this third one to state the "date and hour" of the registry thereof in the mortgage office.

Plaintiff's counsel treats *this return* on this third copy of the notice as *sacramental*, and argues that if that return is not made strictly as required *there is no seizure*. We have seen that *the recordation constitutes the seizure*. Can it be that the omission of the sheriff in his return to state the "date and hour" of registry can obliterate the fact of registry, and make non-existent that which really exists? This is the very refinement of technicality.

There is no evidence of the date of this registry. We only have the sheriff's return on the writ that was "received November 28, 1874, and levied upon the property described in the within annexed notice of seizure; * * * caused the said notice of seizure to be duly recorded," etc. The words "recorded August 30, 1875," written across the back of the writ, are unsigned and not in any way connected with the sheriff's return thereon. We must, in the absence of contrary proof, presume that the sheriff did his duty and recorded the notice. He says he did. If the words referred to mean anything, it is that the writ itself was recorded somewhere, but where is conjectural.

Third—There was a notice of seizure given to and served in person upon the plaintiff as shown by the record.

Fourth—The property is described as a square of ground, No. 243, in the Sixth District, bounded by Magazine, Camp, Valmont and Leontine streets, measuring 378 by 306 feet. We are at a loss to see what defect there is in this description.

It embraces the whole square; and even if there be a discrepancy of a few inches in the dimensions one way and a few feet another between the notice and plaintiff's title, what matters it? The bounds are accurately stated and well defined. There can be no mistake. We see no nullity in the judgment or sale, and the court *a qua* properly rejected plaintiff's demand. But it improperly awarded damages against the plaintiff and his surety in this action.

It is therefore ordered and decreed that the judgment appealed from, rejecting and dismissing plaintiff's demand, is affirmed; that the judgment dissolving the injunction and condemning plaintiff and surety in damages be annulled, so far as it awards said damages, and in all other respects is affirmed—reserving to defendants their right to proceed on the injunction bond for such damages as may be due. It is further ordered that plaintiff pay costs of the court below and defendant those of this appeal.

Freret vs. Heirs of Freret.

No. 7265.

HERMINIE FRERET VS. HEIRS OF J. P. FRERET. RULE OF HEIRS TO ERASE MORTGAGES—OPPOSITION OF JUDGMENT CREDITOR.

A succession is terminated when, all the debts appearing to have been paid by a final account of its administrator duly homologated, the heirs shall have been put in possession of the hereditary effects by a judgment of court.

Or when, the debts not being all paid, and the account of the administrator's actual gestion being duly homologated, the heirs *nemine obstante* are put in possession by a judgment of court, in which case each heir is liable to the creditors for his virile share.

A succession being thus at an end, the heirs are owners in common of the hereditary effects, and the Second court of New Orleans, being a court of Probates only, is without jurisdiction of a suit for their partition.

Woolfolk v. Woolfolk, 30 Annual, 139 approved.

Heirs of age, who have been put in possession of the property of their ancestor by a judgment of court, can sell their hereditary property, but such sale will not disturb or affect the mortgages of their ancestor, nor those existing against the individual heirs.

A PPEAL from the Second District court of Orleans, *Tissot, J.*

Ogden & Hill and *Lancaster* for the heirs.

Seghers for the Opponent creditor.

The opinion of the court was delivered by

MANNING, C. J. James P. Freret died in 1869, leaving a widow and thirteen children, three of whom were minors. In 1875, all the heirs being then of age, they petitioned the Second Court of Orleans for recognition as heirs, and to be put in possession of his estate, and requiring the widow, who was the representative of the succession, to file an account. This suit was filed October 1st. and judgment was rendered on 5th. of same month, recognising the petitioners as heirs, and ordering that they be placed in possession of the property. Nothing was decreed touching the prayer for an account.

On the 8th. of the same month, Herminie, one of the heirs, brought an action against her co-heirs and the widow for a partition, alleging that her mother had formally waived and renounced her rights as usufructuary (all the property was community), and that the heirs "have been recognised as such by the proper court, and placed in possession of the estate of their father," and concludes with the averment "that she is unwilling longer to hold said property in common, and therefore prays that the parties" be cited, and a partition be decreed. Each defendant took the trouble of filing a separate answer, all admitting the correctness of the plaintiff's allegations, and joining in the prayer for a partition. Judgment was rendered November 3, 1875, beginning with the recital "the court considering the pleadings and the evidence, from which it results that the parties to this suit are owners in common of

the property described in the petition," and concludes with a decree for partition by licitation, the experts having reported adversely to one in kind.

Pursuant to this decree, a public sale was made December 21, 1875, by the auctioneer, and the widow bought the whole property, the sum total of the several adjudications being forty-one thousand five hundred and one dollars. On the 21st. of the following month, the formal Act of sale before a notary was made by all the heirs to the purchaser, reciting that, in obedience to the judgment of partition, a public sale of the property had been made by an auctioneer, and "in order to furnish to the purchaser an authentic deed of conveyance of the property thus adjudicated to her," they then and there transfer the title to the widow Freret.

This notarial Act goes on to recite that, "whereas the estate of the late James P. Freret is indebted in the following specified sums, as per tableau filed in court in the matter of the succession of J. P. Freret, the said widow Freret, as purchaser, assumes personally the payment thereof in reduction of the price of the present sale," and furthermore recognises and assumes the mortgages which may secure those debts, which are then set forth seriatim. They amount to \$15,300.00. There was due to the widow for paraphernal funds, and for the balance due her on her account of her administration filed in court, \$9,014.98, and the residue of the purchase price was therefore \$17,186.02. Half of this belonged to the widow in community, for it must be noted, that the property, which was sold, was not the undivided half that belonged to the deceased, but the whole and entire property which was owned in common by his heirs and his widow in community. The remaining half, divided among thirteen children, gave \$661.00 as each one's portion of the purchase price.

Prior to the filing of either the petition for recognition of heirs, or the suit for partition, and evidently as a preparatory step thereto, the widow had prepared the final account of her administration, and on the day previous to the actual filing of the first, had sworn to its correctness. And that this is the final account, and that it was approved by all the heirs, is shewn by the fact that the sum stated by them and by her before the notary in January, as being due her "as per account filed in court by her," corresponds exactly with the sum stated as a balance due her in the account, sworn as correct on September 30, 1875. It is twice mentioned in the notarial Act—first as "the tableau filed in court in the matter of the succession of James P. Freret," as containing statement of the debts, and second as "the account filed in court." And this explains the omission in the decree of any order to file an account. It evidently was waived because they who had called for it had been

furnished with it. The whole proceedings were conducted contradictorily in form, but manifestly only nominally, and they not only knew of the final account, but supposed it had been filed in court, and so stated before the notary—they treated it as a finality and as being correct, and they were all majors. But it had not been filed in court, and was not until seventeen days after the notarial act of sale was passed, i. e. on February 7, 1876. A creditor of two of the heirs, claiming to be owner of their shares of their father's succession under a judicial sale, opposed the account. It was homologated so far as not opposed two weeks afterwards, i. e. February 21st., and the claim of ownership was unsuccessful. *Hickman v. Freret*, 30 Annual, 1067. No other homologation was ever sought, and none was needed.

In July 1878, shortly after the decision of the case cited above, the heirs and the widow and purchaser, moved a rule on three persons, who had judicial mortgages recorded against two of the heirs, and upon the Recorder of mortgages, to shew cause why they should not be erased. That is the commencement of the contestation now before us.

Augustus F. Hickman is one of these three, and he answers the rule, alleging that the whole proceedings in and for partition are null, because the heirs had already been put in possession of the property, and the succession was therefore at an end, and the Second court, being a court of Probate, was without jurisdiction. Thus we are brought face to face with one of those questions of jurisdiction, which are vexatious without being useful—upon which hinges the validity of protracted legal proceedings, and which after all involve no permanent legal principle, worthy to engage the intellect, but only a verbal construction, that is soon rendered of no service, by the adoption of another phraseology. It would be a boon to the bar, the bench, and to suitors, if the forum of jurisdiction could be fixed beyond dispute.

The object of our pains-taking, in making the foregoing connected narrative in detail, and by date, is now apparent. That the succession was ended by the judgment of October 5, 1875, and the heirs were thenceforward owners in common of the property of their ancestor is indubitable. The administratrix had rendered her final account, not to the court if you will, but to the heirs, who were masters of their own affairs, and no creditor of the deceased or of his succession interposed or objected. The heirs and the widow considered and treated that judgment as terminating the succession. Three days after it was rendered, one of them bases her right to a division of the property upon the fact that she and her co-heirs had been placed in possession of it, and as if designedly to exclude all idea of an existing succession, language is employed which is specially appropriate to persons who own property together—"she is unwilling longer to hold said property in common"—

and the court bases its decree upon the ascertained result of the pleadings and the evidence, that "the parties to this suit are owners in common of the property." Afterwards, throughout the notarial Act, they speak of the succession as a thing apart. The source of their information of the debts, which the purchaser assumed, is stated to be a tableau filed in court in the matter of the succession of J. P. Freret, and as if to superabundantly exhibit the recognition of the fact that each one of these owners in common possessed in his own right, however derived the title was, it is recited—"in regard to certain judgments recorded against Gustave J. Freret and William P. Freret (and two other heirs) either separately or *in solido*, the widow Freret, having taken cognisance of said certificate (of mortgages) declares notwithstanding, that she consents to abide by these presents."

The parties to the partition suit being thus owners of the property as joint-tenants, or coparceners, or in common, had the probate court jurisdiction of the subject matter? We have heretofore held that it had not. *Woolfolk v. Woolfolk*, 30 Annual, 139. The counsel for the heirs observes, that "the final decision of that case turned on other points, and that in the actual decision, the point of jurisdiction did not and could not come under consideration, consequently that the original opinion on that point becomes an *obiter dictum*." And this, notwithstanding we said in that final decision, speaking of the original opinion;—"in that opinion we held that the parish court was without jurisdiction *ratione materiæ* in the matter of the partition, for the reason that * * * there was no longer a succession to be partitioned. We see no reason at present to change our opinion as then expressed." *Ibid.* 144.

We propose however to examine it anew, and we are impelled the more readily to do this, because in several matters touching the jurisdiction of the Second Court of Orleans, we have disturbed the practice that has hitherto obtained. The conservatism of the Profession has justly attributed great force and sanction to the rule *stare decisis*, as embodying a principle that lies at the foundation of stability and order, and we have too much reverence for it to lightly disregard it.

Our Civil Code devotes a special chapter, in that part which treats of Successions, to the manner in which their judicial partition is made. arts. 1245 *et seq.* new no. 1322. The Code of Practice gives minute directions as to the mode of procedure in that class of partition suits. arts. 1020 *et seq.* But to say, there are no other kinds, is to ignore the history of our courts and the evidence furnished by our Reports, to say nothing of the positive provisions of our law. Two or more proprietors of a piece of property, who had acquired it by purchase, donation, or other mode, are not condemned to a perpetual joint ownership of it.

Hence we find the existence or the possibility of other kinds of partition suits recognised, and provision made for them. In matters relative to the partition of real property between several co-proprietors, the suit must be brought before the court of the *situs* of the property. Code Prac. art. 165. And in "an Act relative to partitions," not of succession property only, but of all property held in indivision, provision is made for the forum when the property is in different parishes, and the partition is to be between two or more co-proprietors of one continuous tract of land, (Sess. Acts 1855, p. 337 sec. 2. reenacting a law of 1832), while all partitions of successions must be made by the court where they have been opened. Code Prac. art. 164. par. 4.

The action of partition, regulated by the Civil Code, arts. 1250—1303 inclusive, new nos. 1327—1381, is by express language the action for the partition of successions. The next Art. 1304 reads ;—"All the rules established in the present section, with the exception of that which relates to collations, are applicable to partitions between co-proprietors of the same thing, when among the co-proprietors any are absent, minors, or interdicted, or when the co-proprietors of age and present can not agree on the partition, and on the manner of making it. But in these kinds of partition, the action must be brought before the judge of the place where the property to be divided is situated, wherever the parties may be domiciliated."

This article forms art. 1290 in the Revisal of 1870, being displaced. It applies the rules for succession partition, with a single exception, to those kinds of partition suits, where any of the co-proprietors were of certain classes, or without being of those classes, if they could not agree. All partition suits, other than those of successions and those above provided for, are placed out of the dominion of those minute exactions of details which the Code elaborates in the series of articles above cited. In other words, partition suits between co-proprietors, when they are present, or majors, or not interdicts, are not governed by the rules established in that section for the partition of successions.

So again, the law provided when heirs of a succession hold property in common, and wish to divide it, they may proceed in a certain way. Rev. Stats. sec. 2667. But this was found too narrow in its application. Why should not others than "heirs of a succession" divide common property in the same way? And these words were stricken out, and in lieu of them were inserted, "two or more persons, some or all of whom are minors." Sess. Acts 1878, p. 47.

The counsel for the heirs endeavours to deduce from certain parts of the Code the idea that the common ownership of persons, who have inherited property, is but a continuation of the succession of the ancestor. Thus, though co-heirs have enjoyed their hereditary effects in

Freret vs. Heirs of Freret.

common for an hundred years and more, without making a division, any of them can at any time sue for a partition. art. 1227 new no. 1304. In other words, if the succession was not partitioned while it was a succession, or if the heirs, after the succession had ceased to exist, refrained from dividing it for a hundred years, that should not perforce be a bar to ever dividing it. And again, if one of the heirs has enjoyed the whole succession, or a part of it separately—or if each have possessed separately a part of it—for thirty years, then each, thus separately possessing, can successfully oppose the suit for a partition of the effects of the succession. art. 1228 new no. 1305. In other words, a prescription of thirty years can be successfully pleaded in bar of any new partition, when an heir has undisturbedly enjoyed a particular piece of property of a succession as his own. But although the heir can hold on to a particular piece of property under those circumstances, if all the others have possessed the residue of the succession effects in common, either of those can always provoke a partition of such residue. art. 1229 new no. 1306.

Successions cannot continue long. They are intended to be short-lived. Our law emphatically limited their duration to one year, and if necessity demanded their prolongation, required the executor or administrator to obtain special permission from the court to continue his functions another year. They now continue in office until the estate is finally wound up. And it would avoid infinite confusion and great ultimate loss, if the probate courts would uniformly enforce the requirements for early settlement, although their enforcement would sometimes occasion present and immediate losses.

And if they are not perpetual, our law would be singularly defective if it did not determine when they do end. Their termination is fixed at the time when, all the debts appearing to be settled by a final account of their representative, the heirs are put in possession of the hereditary effects by a judgment of court, or when, the debts not being all paid, and the final account of the representative of his gestion being homologated, the heirs, *nemine obstande*, are put in possession by a judgment. In that case, provision is made for the compulsory payment of the unsatisfied debts, for which each heir is bound for his virile share.

In this case, the unpaid debts, with their attendant mortgages, were expressly assumed by the purchaser of the common property, each heir, relieving himself to the extent of his share, of that virile contribution, the liability for which attached the moment he was put in possession. The succession ceased when the judgment putting the heirs in possession was executed, and the property thenceforth became their common property as owners, and passed to their vendee, subject to whatever rights creditors of each individual heir had acquired.

It is supposed, we infer from the tenour of the argument, that the nullity of the decree of sale made by the Second Court strikes the actual sale made by the heirs with an incurable infirmity. It is not so. The heirs were all majors. Irrespective of any judgment, they united in a sale of the property which they owned. They had a perfect legal right to sell, and they did sell, but that sale did not destroy or affect the mortgages already existing against each of them. The creditor, with the lien resulting from recording his judgment, has the same recourse that he has against any other judgment debtor, who has made a voluntary sale of the property affected by such mortgage. Therefore,

It is ordered that the judgment of the lower court is avoided and reversed; and that the rule of the heirs and the purchaser is dismissed at their costs, and that the opponent have and recover of them the costs of this appeal.

CONCURRING OPINION.

SPENCER, J. In my opinion the real question in this case is largely one of fact. There can be no possible doubt that the partition of successions must be sued for in the probate court. C. P. 1022, 164.

It is equally clear that of all other actions of partition, the probate court has no jurisdiction.

The question here is, was the property partitioned that of a succession?

Plaintiff's argument that, under articles 1292, 1304, 1305 and 1306 of Civil Code, there is "a continuation of the succession, which does not lose its character of a legal entity, until broken up by subjecting its parts to individual dominion," *i. e. until partition*, is, I think, inadmissible and refuted by the plain textual provisions of the Code itself.

As long as a succession exists, and maintains itself as a "legal entity," nothing can be clearer than that *its* creditors are preferred upon its assets to the creditors of the heir; just as the creditors of a firm, a juridical being, have preference on its effects over the creditors of the individual members of the firm.

The best test therefore of the existence or non-existence of a succession will be found in these texts of the Code which determine the facts, conditions and circumstances which terminate the existence of this right of preference of succession creditors over those of the heir.

When a succession has been opened the law directs that, pending the deliberations of the heir as to acceptance, an administrator may be appointed. C. C. 1039, 1040, 1044.

If the acceptance is *beneficiary*, the administrator necessarily proceeds with his administration. C. C. 1058.

If the acceptance by the heir is *pure and simple*, "all the effects

Freret vs. Heirs of Freret.

which compose the succession must immediately be delivered to him," he becoming responsible for all its debts. C. C. 1056.

To protect the creditors of the succession, the law gives them the right, *before the heirs take possession*, to require of them *good and sufficient security* for the payment of their debts. C. C. 1011 and 1012. Even where this security has not been demanded, the creditors have three months, from the date of his acceptance and possession, to demand a "separation of patrimony." C. C. 1444, 1456.

"The effect of this demand on the part of the creditors of a succession is to cause them to be paid from the effects of the succession *in preference* to the creditors of the heirs." C. C. 1446.

The right therefore of the unconditional heirs to the possession of the effects of the succession is undoubted. Where they demand possession, if there are succession debts unpaid, it is the duty of the administrator, if there be one, as representative of the creditors, to require of such heirs, under articles 1011 and 1012 C. C., good and sufficient security for the debts; or the creditors themselves may so require. If this has not been done, the creditors may within three months demand a "separation of patrimony." But it is clear that under these rules, if heirs of age be permitted to take absolute possession of the effects of the succession, and to mingle them with their own, the creditors of the succession lose their right of preference thereon and cease to be such—*thereafter being only creditors of the heirs*—and this for the simple reason that their debtor, the succession, as a "legal entity," *has ceased to exist*, and its patrimony has been lost, by merger into that of the heir. This I take to be the doctrine announced in *Woolfolk vs. Woolfolk*, 30 A. 139. I say therefore that the real question in this case is one of fact, to wit: Did the heirs of Freret, being all of age, under the order of court, directing them *to be put* into possession, *take real and actual possession* of the effects of the succession? If they did, *the succession ceased to exist*, and any suit thereafter brought for partition could not be entertained by the probate court, because there being *no succession*, none could be partitioned. After the succession was thus merged, and had ceased to exist, and up to the partition, the heirs were simply *owners in common* of the property. There was a community or joint ownership of the property, to which the rules of prescription, enunciated in C. C. 1304, 1305, and 1306, are of course applicable.

I think the pleadings in the partition suit show and estop the heirs of Freret from disputing that "they had taken actual possession *before* that suit was brought. I therefore concur in the decree of the court.

Mr. Justice WHITE dissents, and reserves his right to hereafter file his reasons therefor.

Jacob vs. Preston.

No. 6502.

JOSEPH JACOB VS. ROBERT L. PRESTON. CITY OF NEW ORLEANS, APPELLANT.

Where an appeal is taken by motion neither petition nor citation is necessary.

The district courts of the parish of Orleans have but one term, which extends from the first Monday in November to the fourth day of July; and an appeal may be taken by motion in open court, at any time during that term, on a judgment signed during the term.

The judgment making absolute a rule taken by a purchaser of property at sheriff sale, to have certain mortgages and privileges on the property erased, is a definitive judgment, and must be signed by the judge.

Where one of the parties to the suit takes a rule on the other, raising certain issues, and the other party takes a counter rule, involving the same issues, and the rules are tried and decided together on the same day, and treated by parties, attorneys, and the court as if consolidated, and an appeal is taken from the judgment of the court making the counter rule absolute, the appeal will not be dismissed on the ground that the judgment on the original rule not having been appealed from within a year, had acquired the force of *res adjudicata*.

Tax liens, or privileges on certain property, which were not recorded at the time a third person acquired rights to, or upon the property, can not be enforced to his prejudice, when it appears that such liens arose from a tax imposed *before* such third person acquired his interest.

A PPEAL from the Sixth District Court, parish of Orleans. *Saucier, J.*

Julien A. Seghers for plaintiff and appellee.

Sam. P. Blanc, Assistant City Attorney, for city, appellant.

The opinions of the court on the two motions to dismiss were delivered respectively by MARR, J., and MANNING, C. J., and on the merits by SPENCER, J.

ON MOTION TO DISMISS.

MARR, J. The purchaser of real estate, at sheriff's sale, took a rule on the city of New Orleans, and others, to show cause why the privileges and mortgages inscribed in their favor, respectively, should not be cancelled so far as they bear upon the property in question.

From the judgment, making this rule absolute, the city of New Orleans took a suspensive appeal.

The appellee, Jacob, moves to dismiss the appeal on the grounds:

1st. That the appellee has not been cited; and that the fault is attributable to the appellant, as no petition was filed or citation prayed for.

2d. That the motion, upon which the order of appeal was granted, was not made at the same term of court at which the judgment was rendered.

3d. That the judgment did not require signature; and no appeal could be taken therefrom after the lapse of ten days from its rendition.

FIRST. The appeal was taken by motion, and neither petition nor citation was necessary.

SECOND. The right of appeal did not exist until the judgment was signed. It was signed on the 13th November; and the appeal was taken on the 16th November.

There is but one term of the district courts in the parish of Orleans; and it extends from the first Monday of November to the fourth day of July, Act of 1869: and an appeal may be taken, by motion in open court, at any time during that term, on a judgment signed during the term.

THIRD. The Code of Practice, art. 546, requires the judge to sign all definitive or final judgments rendered by him: and art. 539 tells us that definitive or final judgments are such as decide all the points in controversy between the parties.

The judgment in this case is definitive, final. It disposes of the entire controversy; and the law made it the duty of the judge to sign it. The motion to dismiss is without foundation in law; and it is denied, with costs.

ON SECOND MOTION TO DISMISS.

MANNING, C. J. The appellee moves to dismiss the appeal herein on the ground—

“That after the appeal herein granted, a judgment in the same suit, between the same parties, and upon the same matters in controversy, rendered on the 29th September, 1876, and signed on the 2d January, 1877, has become final, settling all the matters and things involved in this suit, which judgment now constitutes *res judicata*, having been rendered and signed more than a year ago, and no appeal having been taken therefrom.”

The facts are, on the 24th August, 1876, the City of New Orleans filed a rule in this suit, calling on plaintiff and the sheriff to shew cause why the City of New Orleans should not be paid her tax judgments and costs, out of the proceeds of sale, in preference to plaintiff.

On the 4th of September, 1876, the plaintiff filed a counter-rule, against the City of New Orleans and the sheriff (and other parties in interest,) which rule admits the city's privilege and her right to be paid by preference, the taxes claimed by her for the years 1873—1876 inclusive, and denies that for the taxes of 1869, 1870 and 1871 she has any privilege, and asks that the city and the sheriff (together with other parties in interest) shew cause why the sheriff should not be authorized to have cancelled all mortgages and privileges on the property, except those for the city taxes for 1873—1876 inclusive, and certain State taxes.

Jacob vs. Preston.

Both rules were returnable, and were tried, on same day, together and upon same evidence, and were decided together and on same day. In other words, the parties, their counsel, and the court treated them as if they had been consolidated. They were in fact filed in the same case.

We shall follow their example, and hold that the city's appeal from the judgment on the plaintiff's rule is not dismissable because the same issue was decided in a simultaneous proceeding in the same case. There was no occasion for the judge to sign another judgment in January. It cannot work harm to the appellant who had already done all that was necessary to be done to protect her interests. The motion to dismiss is denied.

ON THE MERITS.

SPENCER, J. Mrs. Cazabat purchased in July, 1868, certain lots in New Orleans, and gave for part of the price her promissory notes, secured by mortgage and vendor's lien. These notes came into the possession of Jacob. This mortgage was duly recorded in 1868. In February, 1872, Mrs. Cazabat sold this property to R. L. Preston for part cash and part on time, payable at certain dates, "provided, however, that all the taxes, privileges, liens, and mortgages now standing against said property are erased and canceled from the records of the mortgage office, otherwise the payment of said sum of \$8000 is extended until the full release and cancellation of said encumbrances and mortgages."

In June, 1876, Jacob, as holder of Mrs. Cazabat's notes for the price, seized and sold the property, and bought it. The city of New Orleans claims by third opposition the taxes of 1869, 1870, and 1871—all subsequent taxes being paid.

There was no registry of the delinquent city taxes of 1869, 1870, and 1871, in the mortgage office, until 1873, when the registry thereof was effected under and in accordance with the provisions of act No. 73 of 1872, relative to city taxes, approved April —, section 11 of which provides :

"That all taxes due and unsettled at the passage of this act, or hereafter becoming due, are hereby declared to be a lien and privilege upon the property assessed for the same, to have priority over all other liens and privileges."

"And against all other properties of the delinquent, they shall have the force and effect of a lien from the date of their being recorded in the mortgage office."

The city contends—

First—That no registry is or ever was necessary in order to preserve tax liens.

Second—That if article 123 of the constitution be held applicable to tax liens, that it was inoperative as to city taxes, until put into operation by legislative act, which was not done until said act seventy-three of 1872.

Third—That the provisions of the constitution and Code, relative to registry, can only be invoked by third persons, and that neither plaintiff nor any other citizen is or can be a third person within the meaning of the law, *quoad* taxes.

Per contra, the plaintiff invokes art. 123 of the constitution, act No. 95 of 1869, and articles 3273 and 3274 of the R. C. C., as well as act 42 of 1871, sec. 67.

We have read with interest the very able and ingenious argument of the Assistant City Attorney upon the nature and character of taxation; and if we were permitted to consider the matter from a purely theoretical and philosophic standpoint, would be greatly inclined to adopt his views. But we think that the positive and plain provisions of our law do not admit of our resorting to theory and philosophy for the solution of the questions at issue. Since the adoption of the constitution of 1868 our legislation has all proceeded upon the idea that registry was necessary to the prosecution of tax liens, and all the revenue laws of the State have provided for recording the delinquent rolls in the mortgage office. This court has frequently recognized the application of the registry laws to tax liens, and that can hardly be considered now an open question. 28 A. 496; 26 A. 592; 22 A. 278; 23 A. 270, 694, 695; 24 A. 25; 25 A. 232; 26 A. 80, 350, 351. If *no one* can be considered a *third person, quoad* a tax lien, as contended for by the city, then all this legislation touching the registry of such lien is meaningless and idle. If registry is only necessary in order to affect third persons (to which we all agree), and if there can be no third person, it would be foolish to provide for the protection of such an impossible class. We are not disposed to view the legislation in that light; and we hold that tax liens, which *should have been recorded*, but which *were not recorded at the time a third person acquires rights to or upon the property*, can not be enforced to his prejudice. We hold that, in such case, as to such third person, there is *no lien, no privilege*, for the taxes. The constitution, art. 123, expressly declares that "no privilege shall affect third persons, unless recorded." The R. C. C., articles 3273, 3274, and 3347, are to same effect. These laws are mandatory and prohibitory. If it be true that until act 73 of 1872 *no special mode of effecting a registry* was provided for the city of New Orleans, does that fact

enable us to disregard these prohibitions? These were general laws, found in the revenue acts of the State providing modes of registering tax liens, and in the absence of *special* regulations, the city should have pursued them.

The question of *priority of registry* can never arise between a *privilege* and a *mortgage*. If a *privilege* exists, it is, in its nature, *higher than a mortgage*, and must of necessity be paid before and in preference to it. C. C. 3186, 3187.

The only question that a mortgage creditor can raise is *as to the existence of the privilege*, since if it exists it primes his mortgage, being higher in its nature. Now our laws regard *non-recorded* privileges as *non-existent*, so far as concerns third persons. Hence *no privilege* for delinquent taxes, *unrecorded when plaintiff's mortgage took effect*, exists as to him, so no such privilege, *unrecorded at the date Preston bought the property* (in February, 1872), can be enforced against it in his hands. That was what this court decided in *New Orleans Savings Institution vs. Leslie*, 28 A. 496. The question there was, whether city taxes of 1868 and 1869, *not recorded until 1873*, could affect a mortgage given in 1871. The court properly held them without effect.

We must not be understood as holding that privileges, accruing from taxes levied *subsequent to the registry of a mortgage*, and which have been recorded before the rights of other persons have attached, can be subordinated to, or primed by, such mortgage. The fact that *the registry of the mortgage antedates that of the privilege*, is matter of no moment. If the privilege exists, and has been preserved by registry, it, by its nature, takes rank above a mortgage. The rule of the Code requiring the recording of contracts creating privileges, to be made on the day of the making of the contract, can not, in the nature of things, be applied to tax liens; for they do not arise from contracts, but from facts and circumstances wholly independent of the will of the party. A registry of the delinquent roll, *at any time*, will preserve the privilege as against persons acquiring their rights *prior to the imposition of the delinquent tax*. But in this case R. L. Preston purchased this property and acquired his rights thereto *subsequent to the imposition of the taxes sought to be enforced*, and *subsequent to the date when the delinquency should have been recorded*. By the terms of his act of purchase, he acquired with reference to the existing recorded liens, privileges and mortgages. Where these two facts concur, to wit, where the right is acquired *after the tax is imposed*, and *after the delinquency thereof should have been recorded*, that right will not be affected by any subsequent registry. That would be giving to laws a retroactive effect, and divesting vested rights, in contravention of the constitution. This disposes of act 73 of 1872, which was passed after Preston purchased. It can not

Jacob vs. Preston.

resuscitate and revive privileges that were inoperative when he purchased.

We see therefore that the city can not enforce these taxes against the property in the hands of Preston. As against the property in his hands it has no privilege, and the court below properly rejected its demands. The judgment appealed from is affirmed with costs.

No. 7360.

THE STATE OF LOUISIANA VS. THE SOUTHERN BANK.

A banking corporation which organized in the year 1873 under the free banking law reenacted in 1870, is liable for the same license tax imposed on other banking institutions.

A PPEAL from the Sixth District Court, parish of Orleans. *Rightor, J.*

Jas. C. Egan, Assistant Attorney General, and *O. N. Ogden* for plaintiff and appellant.

Edward Bermudez, Hornor & Benedict, and *F. W. Baker* for defendant and appellee.

The opinion of the court was delivered by

SPENCER, J. This is a suit to recover of the Southern Bank a license tax of \$250 for the year 1878, under paragraph 8, sec. 9, of act No. 8 of said year, which directs the collection of said license "from each banking company or private bank or agency."

The defense is, "that the bank, being a free bank, organized in 1873, and doing business since then, as such, is exempt by the law regulating free banking in this State, under which it was formed, from the payment of any license whatever."

There was judgment for defendant, and the State appeals.

The discussion has taken a wide range, far beyond the limits of this case.

We have nothing to do with the constitution of 1852, the free banking law of 1853, or the decisions of this court thereunder, except so far as the latter may discuss and decide analogous questions. It may be true, we are not called upon to question the proposition, that under the constitution of 1852 and act of 1853 the free banks were not liable to a license tax, for the reason that the State had by that act bound itself, as by contract, not to impose such tax. This court certainly so decided in *New Orleans vs. the Southern Bank*, 11 A. p. 41, and again in a similar case entitled *the State vs. Southern Bank*, 23 A. 271.

But in 1868 a new constitution was adopted, and in 1870 the free

The State vs. the Southern Bank.

banking law was reenacted, and in same year other laws were passed upon the subject of taxation of banks and banking. As we have seen, the present "Southern Bank," defendant herein, organized in 1873. The question for our decision is, whether, under the constitution and laws of this State, in force at the time of the organization of said bank in 1873, it was exempt from license taxes?

The free banking act of 1870, found in the Revised Statutes, contains (sec. 307) this provision:

"Bankers and banking companies doing business under this act shall be taxed upon their capital stock at the same rate as other personal property under the laws of this State."

This is the same provision which the act of 1853 contained, and by virtue of which this court, in the cases cited from 11 and 23 An., held free banks to be exempt from license taxes.

But by section 315, R. S., the very act under which exemption is claimed, and the third section of act 126 of extra session of 1870, it is provided that "there shall be levied and collected" an annual license tax * * * from each banking company or agency.

Article 118 of the constitution of 1868 reads as follows:

"Taxation shall be equal and uniform throughout the State. All property shall be taxed in proportion to its value; to be ascertained as directed by law. The General Assembly shall have power to exempt from taxation property actually used for church, school, or charitable purposes. The General Assembly may levy an income tax upon all persons pursuing any occupation, trade or calling. And all such persons shall obtain a license as directed by law."

These were the general laws in existence at the date of the organization of the defendant bank in 1873. They are all general laws of the State, and, bearing upon the same subject matter, must be construed together. Does there result from them a contract on the part of the State to exempt the defendant from license taxes? So far from such exemption resulting, we have seen that the 315th section of the very act under which defendant organized, imposes a license of a much larger amount than the one now demanded. We think therefore no such conclusion can be deduced from these laws; and if they do not confer exemption *as upon contract*, then the defendant may be compelled to pay license. Since we hold that there was no contract between the State and defendant, it is unnecessary to go into the inquiry as to whether under article 118 of the constitution the Legislature could contract to make such exemption.

The judgment appealed from is reversed, and it is now ordered and decreed that the State of Louisiana do recover of the defendant, the Southern Bank, the sum of two hundred and fifty dollars, with two per

The State vs. the Southern Bank.

cent fees due Attorney General and Assistant Attorney General for collection on amount of judgment, to be taxed as costs, and with recognition of the privilege accorded by law on the property of said bank. It is further ordered that the injunction prayed for be made perpetual, and that defendant pay all costs of suit.

Rehearing refused.

No. 7280.

HENRY WHITE VS. FIFTH REGULAR BAPTIST CHURCH.

Where the judgment of the lower court dismisses the petition of the intervenor in the suit, and gives a decree in favor of the defendant as against the plaintiff, and the plaintiff alone appeals, the intervenor will not be before this court either as appellant, or appellee, and hence the judgment as to him can not be reviewed.

A PPEAL from the Fifth District Court, parish of Orleans. *Rogers, J.*

Singleton & Browne for plaintiff and appellant.

W. R. Crane for intervenor.

The opinion of the court was delivered by

SPENCER, J. Plaintiff sues to recover of the defendant corporation a note secured by mortgage and vendor's lien upon the church-house and lot; also for other items, amounting to \$174 40, to wit: Amount paid Heath for defendant's account, \$56; amount paid Popp & Elliott for lumber used on church, \$68 40, and \$50 for personal services in supervising its construction. He cites the defendant through W. H. Hawkins, president of the board of trustees, and its answer is a general denial.

Kemp, Anderson, and others, intervened, alleging that they are the true board of trustees of said church; that Anderson is its president; that Hawkins and his board are usurpers, who, through fraud, and with the assistance and connivance of plaintiff as pastor of said church, in the month of May, 1873, seized upon and took wrongful possession of said church, and had themselves elected as trustees by a minority of the corporators, and in violation of the charter; and had since then excluded intervenors from said church, from participating in its affairs, and from worshipping therein, and had usurped the functions of trustees thereof, etc. They aver that by reason of these wicked and wrongful acts plaintiff has damaged them and the corporation in the sum of \$5000, and that he should "respond to the corporation in exemplary damages (to said amount), as well as in religious excommunication." Wherefore they pray to intervene and oppose plaintiff. They plead pre-

scription against his demands. They pray for judgment in *reconvention* against him for \$5000, and against the defendants, Hawkins' board, declaring them usurpers; and recognizing intervenors as the true board, and putting them in possession as such.

There was judgment in favor of defendants, dismissing plaintiff's demand as in case of nonsuit, and judgment dismissing the intervention and reconventional demand of the intervenors at their cost.

From this judgment, "so far as it rejects his demand," the plaintiff has alone appealed. The intervenors have filed in this court what they call a "joinder, and answer in appeal," but took no appeal themselves from the judgment dismissing their intervention and "reconventional demand."

This proceeding is, to say the least, anomalous. An intervenor of necessity must confine himself to the *subject matter* in controversy in the main suit. He can not drag into that suit grievances foreign to the thing there in controversy. If A sues B for the price of a horse, C can not intervene and set up by way of "reconvention" that A is indebted to him in damages for an assault and battery, and B for stealing the horse, (C. P. articles 389 and 390), and say that the intervenor may join plaintiff in claiming the same thing, or join defendant in resisting plaintiff's claim to that thing; or may oppose the claims of both to or upon that thing. The intervenor must of course allege and show an interest in the subject matter of the main suit. So far therefore as intervenors claim damages "in reconvention" from plaintiff for wrongful deprivation of church privileges, and so far as they seek a judgment against defendants to eject them from their office of trustees, and to have themselves reinstated, their demands are clearly foreign, not germane, to the matter or thing in dispute between plaintiff and defendant, which is simply whether the Fifth Baptist Church is or not indebted to plaintiff. But an intervenor is "a third person," whose demand "must be formed by a petition," served on the other parties, and put at issue.

Now, if the judgment of the court *dismisses that petition*, and the intervenor do not appeal, is he a party to an appeal taken by plaintiff from the judgment in favor of defendant, rejecting his (plaintiff's) demand? The judgment against the intervenor is not brought before us by plaintiff's appeal from the judgment against him. See *Lane vs. Clark*, 27 An. 201; 8 L. 192; 1 R. 369; 4 An. 14; 14 An. 564. Intervenors are certainly not appellants. They are not appellees, because the judgment passing upon their demands has not been appealed from. If we were to consider them appellees, how could this court pass upon their issue with defendants, who are themselves appellees? A judgment can not be changed or revised as between appellees; and the very basis of intervenors' interest in this controversy rests upon their alleged

White vs. Fifth Regular Baptist Church.

rights as trustees, which could only be passed upon contradictorily with defendants.

We therefore proceed to decide this case as between plaintiff and defendants, who are the only parties before us.

Plaintiff has fully proven his demands, and shown that the amounts claimed are due him. There being no plea of prescription filed by defendants, we are not called upon to decide what effect should be given to the authentic acknowledgments of plaintiff's claim by the acting board of trustees.

It is therefore ordered and decreed, that the judgment rejecting plaintiff's demands be set aside and reversed, and it is now ordered and decreed that plaintiff have judgment against the defendant, the Fifth Regular Baptist Church, for the sum of two hundred and sixty-two 50-100 dollars, with six per cent interest thereon from January 21, 1868, to 25th December, 1868, and eight per cent thereafter, with recognition of the mortgage and privilege claimed, and as described in plaintiff's petition and acts annexed, and that the property therein described be seized and sold to pay said sum and interest. It is further decreed that plaintiff also recover of said defendant the further sum of one hundred and seventy-four 40-100 dollars, with five per cent interest from 1st of July, 1877, and costs of both courts.

No. 5972.

SAMUEL FRIEDLANDER VS. SLAUGHTER HOUSE COMPANY.

A corporation can not be held to knowledge of the ownership of eighty shares of its stock by any transferee of a certificate of that stock merely because he, through an agent, voted at an election, at which 12,475 shares voted in the affirmative, and 68 only in the negative.

Where certain stock of a corporation, standing on its books in the name of a judgment debtor, is seized and sold by the sheriff as the debtor's property, and a judicial tribunal, of competent jurisdiction, of last resort, after a fair contest, in good faith, by the corporation, orders the stock to be transferred to the purchaser under such seizure and sale, the corporation can not be liable to the holder of the certificate of the stock, who took no steps to protect himself.

A PPEAL from the Superior District Court, parish of Orleans. *Hawkins, J.*

E. Howard Farrar for plaintiff and appellant.

Robert Mott for defendant and appellee.

The opinion of the court was delivered by

MARR, J. In May, 1869, the defendant corporation issued to William Durbridge a certificate, No. 80, for 80 shares of stock, afterwards

reduced to 40. In June, 1869, Durbridge sold this certificate to Samuel Friedlander; and signed a blank power of attorney on the back of it, authorizing the stock to be transferred on the books, "in the manner and form required by the said company."

The certificate is as follows :

"This certifies that William Durbridge is entitled to eighty shares of the capital stock of the Crescent City Live Stock Landing and Slaughter House Company, *transferable only on the books of the company by the said William Durbridge or his attorney, on surrender of this certificate,*" dated 3d May, 1869.

Article six of the charter is as follows :

"All transfers of stock shall be recorded in the office of said company, in a book of transfer to be kept for that purpose. The new stockholder binding himself or herself, by the mere fact of recording said transfer, to abide by all the terms, conditions and stipulations of this act, and to any and all the rules, regulations or by-laws, made and adopted in pursuance thereof."

The transfer thus authorized and required was never made; but it was proven that, on the 17th October, 1873, Harris, acting as agent for Friedlander, voted on the certificate No. 80 at a corporate election.

In December, 1873, one Job Smith recovered judgment against Durbridge; and caused seizure to be made, under garnishee process, in the hands of the company. The company answered, stating, among other things, that Durbridge had owned 500 shares of common stock, and 330 shares of preferred stock, which the books of the company showed had all been transferred except 80 shares of common stock; and "that for said 80 shares a certificate, being No. 80 of old issue, was issued to said Durbridge, and whether he holds or has disposed of the the same the company does not know."

Appended to this answer is a statement of transfers made by and to Durbridge, at different dates, from May, 1869, to May, 1873, showing that the 80 shares still stood in his name on the books.

Such proceedings were had in the suit that judgment was rendered in favor of the seizing creditor against the garnishee; and the stock was sold by the sheriff, under execution, in February, 1874. On the refusal of the company the purchaser took a rule to compel the transfer; and the company appealed from the judgment making the rule absolute. That judgment was affirmed in May, 1874; and in May, 1875, this suit was brought.

The petition alleges plaintiff's ownership of the stock, in virtue of his purchase from Durbridge; that the company recognized him as owner by allowing him to vote on the same as owner, through his agent Harris, at the election of 17th October, 1873; that he has demanded

Friedlander vs. Slaughter House Company.

that the transfer be made, and a new certificate be issued to him, on surrendering the original certificate; and that the company refuses to comply with his demand, and to acknowledge him as owner. He therefore prays for judgment against the company, declaring him to be owner of the stock; and that a certificate be issued to him, or that the value be paid to him with interest.

The answer sets out the proceedings in the suit of Smith against Durbridge, and the compulsory transfer by final judgment; and that the company has no stock to supply the place of that so transferred.

That the attention of the company was not called to the fact that Harris, as agent for plaintiff, had voted on the 80 shares; that this vote did not change the result; and that the commissioners of election who received the votes had no power, by receiving or rejecting a vote, to "make or unmake a stockholder."

The answer also states that Friedlander never notified the company that he held the stock as owner, and he did not apply to have it transferred until after the sale by the sheriff. That pending the appeal, while the money bid was in the hands of the sheriff, the attorney of plaintiff was informed of the same, and that defendant would not make the transfer until compelled; and that plaintiff took no steps to protect himself, but allowed defendant to be coerced and compelled to make the transfer to the purchaser at the sheriff's sale.

We fail to perceive any legal or equitable right in plaintiff to recover of defendant. His right would have been clear if the company had made the transfer voluntarily, without the surrender of the outstanding certificate. The company was under no special obligation to plaintiff. He had never given any evidence of his ownership of the certificate except by voting through an agent, which he clearly had no legal right to do. The company was not obliged to recognize any one as the owner of stock except those who were shown to be owners by the transfer book, or by the act of incorporation. During the four years which elapsed from the date of his purchase to the election in October, 1873, he had never asserted his ownership; and the president and directors cannot be held to knowledge of the ownership of any transferee of a certificate merely because he, through an agent, voted at an election, at which 12,475 shares voted in the affirmative, and 68 in the negative. Harris, the agent, was himself a stockholder. The transfer book showed that Durbridge had sold 75 shares to him on the 17th March, 1871. He was a legal voter; and there was no occasion to scrutinize the vote cast, where it was so nearly unanimous.

The answer of the company as garnishee was in accordance with the facts. The certificate had been issued to Durbridge, and the stock had stood in his name for four years and a half; and it still stood in his

name. In preparing to answer under oath the president could not have been required, he would not have been authorized to recur to the minutes of an election. He was bound to consult the stock and transfer books; and truth and justice compelled him to answer in accordance with these books, the only recognized evidence of ownership of the stock.

We must presume that the president answered truly that he knew nothing more of the certificate than is stated in his answer, and shown by the books, and if he had known, or had remembered, that one of the certificates originally issued to Durbridge, representing less than one-tenth of the shares which he originally owned, was held by plaintiff on the 17th October, that would not have indicated, necessarily, that he held it on the 24th December, when the garnishee process was served. If the president had known, when he filed his answer, that plaintiff held the certificate, he certainly should have informed him then, and have so stated in his answer; but he would still have been bound to answer that no transfer had been made on the books of the company, as required by the charter and the certificate; and that the 80 shares still stood in the name of Durbridge.

The argument of plaintiff's counsel admits the notice through plaintiff's attorney, pending the appeal on the rule. There was ample time for plaintiff to have protected himself. The judgment which compelled the company to make the transfer was not obligatory on plaintiff; it was *res inter alios*; and he might, as was done in Smith's case, 30 An. 1378, have asserted his right, and prevented the payment of the money by the sheriff to the judgment creditor, and the transfer of the stock to the purchaser.

The brief filed by the attorneys of the company, in opposition to the rule, shows that they insisted upon the terms of the charter and the certificate as good cause for not making the transfer until the certificate was produced and surrendered.

We see no reason to doubt the correctness of the views expressed in Smith's case, 30 An. We think the sheriff cannot validly seize and sell the stock while the certificate is outstanding so that he cannot obtain possession of it. All that he could seize and sell in such case would be the right and interest of the person in whose name the stock stood on the books of the company, without prejudice to the rights of the actual owner and holder of the certificate for value, and in good faith. But where a judicial tribunal, of competent jurisdiction, of last resort, after a fair contest, in good faith, by the corporation, orders the stock to be transferred to the purchaser under such seizure and sale, the corporation cannot be liable to the holder of the certificate, who took no steps to protect himself.

Friedlander vs. Slaughter House Company.

If there have been laches in this case, there has certainly been contributive fault on the part of the plaintiff. For four years and a half he allowed his stock to stand in the name of another, without legal notice to the company of his title and ownership. This may not impair his right as owner; but he cannot require the company to be more vigilant than he is himself, in asserting and maintaining his rights.

The judgment of the district court is therefore affirmed with costs.

No. 7293.

JAMES GARDINER VS. SUCCESSION OF SCHERER.

Where a simulated sale has been set aside at the suit of a creditor of the pretended vendor, the creditor can not hold the pretended vendee in damages on account of a depreciation of property, arising after the pretended sale, when he fails to show that the simulated conveyance caused the depreciation.

An action for damages on account of an offense, or quasi offense, is prescribed by one year from the date of the act.

A PPEAL from the Second District Court, parish of Orleans. *Tissot, J.*

Jno. S. Tully for plaintiff and appellee.

James H. Grover for defendant and appellant.

The opinion of the court was delivered by

MARR, J. In February, 1872, James Gardiner recovered judgment against Dezutter. Before this judgment was signed Dezutter, by notarial act, conveyed to Joseph Scherer, a house and lot on Rampart street. In January, 1873, Gardiner brought suit against Scherer and Dezutter to have the sale annulled, on the ground of simulation, and to subject the property to his judgment. Pending this suit Scherer died, it does not appear at what date; and his widow, tutrix of the minor children, administered the succession. The district court declared the sale to Scherer a simulation, and that judgment was affirmed by this court.

Under execution on the judgment in favor of Gardiner against Dezutter, the property conveyed to Scherer by Dezutter was sold, and was adjudicated to Gardiner; and shortly after, in October, 1877, Gardiner brought this suit against the widow Scherer, in her capacity as tutrix, to recover the difference between the price of the adjudication and the amount of the judgment against Dezutter.

The allegations of the petition are that there was no consideration for the sale; that it was simulated; and that Scherer combined with Dezutter to place the property beyond the reach of plaintiff's execution and accepted the simulated title, with full knowledge of this fraudulent purpose.

That "if Scherer had not combined with Dezutter to commit this fraud, and had allowed the property to be sold in February, 1872, it would have brought more than was sufficient to cover petitioner's claim, interest and costs; and by the illegal and fraudulent acts of Scherer petitioner has been prevented from collecting his whole judgment, and Scherer became responsible for the difference;" and that his succession, administered by the tutrix, is indebted to plaintiff for the amount.

The tutrix excepted that the petition disclosed no cause of action, which exception was overruled; and she plead the general denial. There was judgment in favor of plaintiff for \$1900, the difference, in the judge's estimation, between the value of the property in 1872, when the judgment against Dezutter became final, and the price of the adjudication, in May, 1877; and the tutrix appealed.

The injury complained of is the depreciation in the value of the property during the time that it stood in the name of Scherer, under the simulated title. It is not charged that the property was injured in any way during that time, nor that it was out of repair. The house was a brick dwelling; and the depreciation is simply that which all real property in New Orleans has suffered, from the various causes which directly affect values, burdensome taxes, want of confidence, commercial disasters, etc., the results of ulterior causes, which have impoverished the people and the State.

This depreciation was not the necessary consequence of the fraudulent and simulated acts complained of. Under a different condition of affairs the property might have increased in value, so that it would have been worth double as much in 1877 as it was in 1872. Nor did the simulated sale necessarily cause plaintiff the delay of five years to which he was subjected. When his judgment became final, and the legal delay had expired, he might have caused execution to issue, and the property to be seized and sold, just as if that simulated title had never existed. If he had taken this course, Scherer would have been compelled either to have abandoned all pretension of right under his simulated title, or to have become the actor, at his own risk and expense, in judicial proceedings to arrest the sale, or to recover possession of the property.

Plaintiff chose not to exercise the right which the law gave him. He waited until January, 1873, nearly a year after his judgment became final; and then brought suit to have the simulated sale annulled, which he had the right and power to treat as a nullity *ab initio*.

In any aspect of the case, the alleged fraudulent conduct of Dezutter and Scherer, and the simulated conveyance, did not cause the property to depreciate in value. In January, 1873, when the plaintiff had such information as justified him in demanding judicially the nullity of the sale, his preference for that mode of enforcing his rights was the

immediate and direct cause of the delay and expense to which he was subjected, which he might have avoided by the immediate seizure of the property. *Non constat*, if the property had been sold in 1872, or 1873, under execution, that plaintiff would not have been the purchaser, as he was in 1877; and that he would not have suffered the precise loss from depreciation of which he now complains.

Defendant plead in this court the prescription of one, three and five years. It is evident that the right of action, if any exist in this case, does not result from any contract or civil obligation between Scherer and plaintiff, but from an alleged wrong; and whether that wrong be an offence or a quasi offence, it is subject to the prescription of one year. R. C. C. art. 3536. This prescription began to run from the date of the offence. R. C. C. art. 3537. The offence was the fraudulent acceptance of the simulated title, on the 14th of February, 1872. If plaintiff had any legal foundation for such a claim, he might well have included in his petition to have the sale annulled, a demand for such damages as he might sustain by the wrongful acts and pretension of Scherer; and have obtained judgment subjecting the property, with suspension of judgment for the damages until the amount could be fixed by the sale of the property. See *Edwards vs. Turner*, 6 Rob. 384, and authorities there cited.

We think the plaintiff was not entitled to recover, independently of the plea of prescription; and that the action was barred by the lapse of time.

The judgment of the district court is, therefore, annulled, avoided and reversed; and it is now ordered, adjudged and decreed that the demand of plaintiff, appellee, be rejected, and his petition and suit be dismissed; and that he pay the costs in both courts.

No. 6806.

CITY OF NEW ORLEANS VS. M. HERMANN.

A cigar manufacturer in the city of New Orleans, although engaged in selling articles of his own manufacture, is liable for the license tax imposed by the city.

A PPEAL from the First Justice's Court, parish of Orleans. *Childress, J.*

Sam. P. Blanc, Assistant City Attorney, for plaintiff and appellee.

Chas. S. Rice for defendant and appellant.

The opinion of the court was delivered by

WHITE, J. The defendant appeals from a judgment condemning him to pay a license as a cigar manufacturer for the year 1877. He

relies on section 3344 of the Revised Statutes, which reads: "It shall not be lawful hereafter for any municipal corporation within this State to lay any tax on persons engaged in selling articles of their own manufacture, manufactured within the State." The city contends that this provision has been repealed, at least *quoad* its application to city licenses, by section 16 of act No. 73 of 1872. Sess. Acts of 1872, p. 127. Her pretension is directly sustained by two decisions of our predecessors, *City vs. Globe Insurance Co.*, 27 A. 656, and *City vs. Dunbar*, 28 A. 722. The defendant insists that the views expressed in the foregoing cases were erroneous, and that therefore they should be overruled. But we are not disposed to depart from the principle of *stare decisis*, unless compelled to do so by a conviction that a previous conclusion has been reached without consideration, or that it is so manifestly wrong as to leave no room for doubt. Neither of which reasons exist here, as both the cases appear to have been considered and interpret the repealing statute in such a manner as, taking the best possible view for defendant, to simply raise a possible doubt as to the correctness of the opinions expressed. The construction of a statute is always a matter of delicacy, and whenever once made, should not be lightly abandoned, more particularly where by it payments have been made, and thereunder the public burdens have been practically adjusted.

Judgment affirmed.

No. 7460.

MICHAEL SHELLY vs. J. G. DOBBINS.

Where by a clerical error in writing up the judgment, another and strange name is substituted for that of the condemned defendant, no valid execution can issue against the real defendant, so long as the error is uncorrected. But it is in the power of the plaintiff, while his judgment is alive, to have the error corrected by a mere motion taken contradictorily with the defendant.

A PPEAL from the Sixth District Court, parish of Orleans. *Rightor, J.*

Cotton & Levy for plaintiff and appellant.

Thos. Gilmore & Sons for Dobbins, appellee.

The opinion of the court was delivered by

MARR, J. Dobbins brought suit against Patrick Lyons, principal, and Michael Shelly, surety, on an injunction bond, to recover of Lyons, plaintiff in injunction, \$1500, and of Shelly \$500, the amount of the bond. They were both cited; and they answered separately. The judgment was against "defendants, Patrick Lyons and Michael Welsh, *in solido*, for \$500."

Shelly vs. Dobbins.

On motion of counsel for "defendants," and on suggesting * * that "a final judgment has been rendered and signed * * * against said Lyons as principal, and said *Shelly* as surety, * * * It is * ordered that said Lyons and *Shelly* be allowed a suspensive appeal," etc.

The appeal bond recites that, "we, Patrick Lyons and Michael *Shelly*, as principals." Wherever the names of the defendants, appellants, appear in the bond, they are Lyons and *Shelly*; and Michael *Shelly* signed the bond as one of the principals.

Two days after, a second bond was given for a larger amount than the first, in which the same parties figure as principals, defendants, appellants; and this bond is also signed by Michael *Shelly* as one of the principals.

When the case came up to this court a motion was made to dismiss for want of jurisdiction. The case was argued by the counsel of Lyons and *Shelly*; and the appeal was dismissed as to *Shelly* on the ground that the amount in dispute, as to him, was just \$500.

Execution issued on the judgment of the district court. The writ is not in the transcript; but we suppose it was against Michael *Shelly*. At any rate, the sheriff seized the property of *Shelly*, alleged to be worth much more than \$500. He enjoined on the ground that there was no judgment against him. The district court dissolved the injunction without damages; and Michael *Shelly* appealed.

It is manifest that the use of the name Michael *Welsh*, instead of Michael *Shelly*, was a mere clerical error in writing the judgment. *Welsh* was not a party to the suit; but *Shelly* was. The injunction bond, the petition, the citation, the answer, the motion and order of appeal, and the two appeal bonds, show conclusively that the person condemned was Michael *Shelly*. The district court has the right and the power to correct the judgment, at any time, on motion, contradictorily, by substituting the name of the party condemned, Michael *Shelly*, for that of Michael *Welsh*, who was an entire stranger to the proceeding.

An execution could not issue against Michael *Shelly*, on a judgment against Michael *Welsh*. The writ must conform to the judgment; and, until the name of Michael *Shelly* has been substituted for that of Michael *Welsh*, by proper proceeding and entry on the minutes, the judgment cannot be enforced against Michael *Shelly*.

The record furnishes no proof that this clerical error has been corrected. The injunction should have been maintained, with a reservation of the right of Dobbins to have the judgment corrected.

The judgment appealed from is annulled, avoided and reversed; and it is now ordered, adjudged and decreed, that the injunction herein granted, *in limine*, be reinstated and be maintained; that the right of

Shelly vs. Dobbins.

Dobbins, appellee, be reserved, to have the judgment in his favor against Patrick Lyons and Michael *Welsh* corrected, contradictorily with Michael *Shelly*, by substituting the name of Michael *Shelly* for that of Michael *Welsh*, as stated in, and in accordance with the foregoing opinion; and that the said J. G. Dobbins, appellee, pay the costs of this suit in the district court and in this court.

Rehearing refused.

No. 5989.

ANN MCCONNELL VS. JOHN PASLEY.

Where the evidence appearing in a transcript is so confused and contradictory that the labor of an expert is necessary to educe the facts requisite to the administration of justice, the case will be remanded, in order that the parties be referred to an expert before the case is taken under advisement by the court.

A PPEAL from the Fifth District Court, parish of Orleans. *Cullom, J.*

Thos. Gilmore & Sons and *Joseph Magioni* for plaintiff and appellee.
Chas. F. Claiborne and *Hornor & Benedict* for defendant and appellant.

The opinion of the court was delivered by

WHITE, J. This is a suit to recover a money judgment against the defendant. The parties have during years had transactions, in which money has been loaned and returned, in which checks have been given and the proceeds disbursed, in which gold has been sold, notes given and canceled, a house built and paid for, from all of which the claimed debt is assumed to result. No regular accounts were kept, and the whole case turns upon the examination of oral testimony, as confused and unsatisfactory as it can well be. To add to these difficulties, the case has been tried with a looseness which passes description, and puts powers of analysis to the blush. In fact, one of the counsel, not engaged in the trial below, informed us that it had taken him a summer's leisure to prepare the brief submitted on the hearing of the cause, and we can fully appreciate the statement, for even with the assistance of oral argument and elaborate briefs, after much examination, and the very closest scrutiny, we have closed the record with the settled conviction, that it is absolutely impossible to draw from the confused mass of testimony which it contains any light by which truth may be discovered and justice done between the parties.

The lower judge, who gave judgment against the defendant, seems to have become aware of the foregoing only after the trial, for when the case was under advisement, doubtless appalled by the labyrinth of facts

 McConnell vs. Pasley.

before him, without notice to the parties, referred the case to an expert for report, and seems to have taken the report thus made as the basis of his conclusions. We think he did, after the case was under advisement, what he should have done during the course of the trial, that is, refer the parties to an expert, C. P. 442, by whom the matter could have been examined in all its details, by the aid of whose report the court might have been able to find at least a clue to the just ascertainment of the rights of the parties litigant. This not having been done, we can not undertake to determine a case where we can actually reach no result, and where the conscience and judgment find themselves completely obscured by the cloud of details under which the merits of the case, if any, are hidden.

The judgment is reversed, and the case is remanded for further proceedings in conformity with the views hereinabove expressed. The costs of appeal to be paid by appellee, those in the district court to await the final result.

Rehearing refused.

No. 7421.

VINCENT T. CAMBRE VS. FÉLICITÉ GRABERT ET AL.

Where plaintiff institutes a hypothecary action to enforce a judgment, which as heir, and as administrator of his deceased mother, he had obtained against his father, the fact that he fails, when properly put to the proof, to show that he was the administrator of his mother, will not prevent him from enforcing his rights as heir of his mother.

A suit brought by a son who has attained his majority against his father on account of a claim he derives as heir of his deceased mother, is not a suit growing out of his father's tutorship, and hence can not be postponed by the latter until a final account of his tutorship has been rendered.

APPEAL from the Fifth Judicial District Court, parish of Iberville, *McVea, J.*

Barrow & Pope for plaintiff and appellant.

A. & E. B. Talbott for defendants and appellees.

The opinion of the court was delivered by

WHITE, J. The plaintiff, individually and as administrator of the succession of Celestine Leonise Lelveque, deceased wife of Jean Theo. Cambre, a resident of the parish of Livingston, brings a hypothecary action against defendants. He avers that in his said capacities, on the 18th May, 1877, he recovered in the Sixth Judicial District Court, as an heir of his mother, Celestinè Leonise Lelveque, for his virile share, and as administrator of her succession, a judgment against his father, Jean Theo. Cambre, for the sum of three thousand dollars, with five per cent

from the 12th of January, 1871, the date of the death of Mrs. Cambre. He avers that the judgment recognized a legal and tacit mortgage, which operates upon property held by the defendants.

The defendants excepted. 1st. That the judgment and all the proceedings had in the succession of Mrs. Cambre, in the parish court of Livingston, are absolutely null and void; that the domicile and residence of Mrs. Cambre at the time of her death was in the parish of Iberville; that no account of tutorship has ever been rendered to the children and heirs of Mrs. Cambre by their father and natural tutor, J. F. Cambre, with whom they continued to reside after the death of their mother, and who maintained and educated them, and until the settlement and liquidation of the tutorship account, no action can be brought to enforce the pretended legal mortgage; that the minor heirs of Mrs. Cambre were not represented when the judgment relied on was rendered, and are not so in this suit.

The plaintiff moved to take the exceptions as an answer, which was refused, the exceptions were thereafter sustained. Plaintiff appeals.

First—The exception to the capacity of the plaintiff as administrator proceeds upon the theory that Mrs. Cambre was domiciled in the parish of Iberville at the time of her death, and that hence the opening of her succession in the parish of Livingston was an absolute nullity. Granting the legal correctness of the proposition, there is nothing in the record disclosing the fact that the claimed administrator was appointed, if at all, by any other than the proper court of the domicile of the deceased. The record abounds with proof that Mrs. Cambre was at the time of her death a resident of Iberville, although she died in Livingston, where she happened temporarily to be; there is nothing, however, in any way showing by what court plaintiff was appointed administrator. The petition does not so disclose, as it simply avers that the plaintiff is the administrator of Mrs. Cambre, without stating by what authority appointed. Grant that the exception was a denial of the plaintiff's capacity as administrator, so as to throw upon him the onus of exhibiting his authority, and that not having so done, he is to be treated as not such administrator, the demand should not have been dismissed. The plaintiff alleged that not only *individually as an heir* of his mother, but also as her administrator, he had recovered a judgment against his father. There is nothing in the exception or the proof questioning the residence of the father when the judgment was rendered. Therefore, eliminating the capacity as administrator, the *individual claim* remained. The obligation of the father of plaintiff to his wife, plaintiff's mother, was certainly heritable; if so, it was either divisible or indivisible; if the first, the plaintiff was entitled to enforce his virile share; if the last, as one of the co-owners of an indivisible

Cambre vs. Grabert et al.

right, he was entitled to enforce the whole. C. C. 2115. Marcadé, vol. 4, p. 538.

Second—The plaintiff is not seeking to collect a claim against his tutor as resulting in any way from the tutorship; he is asserting a right which he avers descended to him as an heir of his mother, and not depending on the tutorship, not connected with it, and which could be enforced as heir, whether or not a tutorship had existed.

The plaintiff avers that as heir of his mother, he had obtained a judgment against his father, not on account of the tutorship, but for a debt due by the father to the mother, and therefore descending to her heirs. For this reason we think this case not governed by Gibbs vs. Lum, 29 A. 524, but rather by Bridges vs. Simonton, 28 A. 830. While we do not wish to be understood as approving the last mentioned case in all respects, we think, in as far as applicable to the issue now before us, it is a correct application of legal principles. We, of course, express no opinion as to the right of a minor to bring a suit like the present when he is under the tutorship of his father.

The judgment is reversed, and the case remanded to be proceeded with according to law.

No. 7424.

KEENE J. COLE VS. WILLIAM G. RANDOLPH.

Where the legality and constitutionality of a tax is in contestation, this court has jurisdiction, no matter how small the amount in dispute may be.

All transient persons selling goods in this State whether by wholesale or retail, on land or water, are liable to a license tax of \$100 per annum.

The law imposing a license tax on transient persons doing business within the State, does not violate that provision of the constitution of the United States vesting in Congress the exclusive power to regulate commerce among the several States, etc.

A PPEAL from the Parish Court of East Baton Rouge. *Sherburne, J.*

J. H. Halsey and A. Goldthwaite for plaintiff and appellant.

Herron, Bird & Beale for defendant and appellee.

The opinion of the court was delivered by

MARR, J. This suit was brought to recover of defendant damages for the illegal seizure of certain personal property. The petition alleges that plaintiff resides at Leavenworth, and is a citizen of the State of Indiana; that he is a flatboat-man engaged in transporting the products of Indiana and other Western States to the Southern States; that he has a flatboat lying at the wharf at Baton Rouge, loaded with such pro-

ducts; that defendant is collector of State and parish taxes, and without just cause and in violation of law seized and took away fifty-five barrels potatoes and thirty sacks oats from petitioner's boat; that petitioner was not indebted to defendant either individually or as State and parish tax collector; and that this unwarranted seizure caused him damage to the amount of \$300.

Defendant answered that he took and sold the potatoes and oats, according to law, for the purpose of collecting the amount of license tax due to the State of Louisiana by plaintiff, who peremptorily refused to pay the same.

The judgment of the parish court was in favor of defendant; and plaintiff appealed. The legality and constitutionality of the tax is in contestation; and this court has jurisdiction under art. 74 of the constitution.

The act of 1872, No. 14, section 1, paragraph 13, fixes the State license tax to be required of "each peddler or hawker, who peddles or carries merchandise or groceries for sale, or sells through this State in a boat or other watercraft, at one hundred dollars."

The word "peddler" means a travelling merchant, one who carries merchandise about the country for sale. It seems that plaintiff has been engaged in this business for thirty years. He descends the river with his boats, stopping and selling wherever he finds a market. That is what he was doing at Baton Rouge when defendant demanded the State license tax. Plaintiff refused to pay it: said the same demand had been made of him at Bayou Sara: that he had taken legal advice there; and that he intended to resist the payment by law.

We think plaintiff was a peddler in the sense of the law; and that he was clearly liable, as such, for the license tax imposed by paragraph 13 of section 1, of the act of 1872.

The proof is that he sold by the package, by the bushel, by the piece, or in quantities as required, such articles as flour, corn, oats, potatoes, meat, bran, dried fruit, stone-ware, etc. He might well have been taxed \$100 for license under paragraph two of the same section, as a "wholesale and retail merchant, dealer or trader."

Section 3330 of the Revised Statutes provides that "all transient persons doing business or selling in this State shall pay their taxes or license before selling or doing business; and upon their refusal or failure to do so, the State tax collector shall seize, without notice, and sell according to the provisions of section 3295."

The only possible application of section 3295 is, that the sale shall be "without process of court;" and the preceding section, 3294, authorizes the sale within five days, "if the property is of a perishable nature."

Plaintiff maintains that the sections of the Revised Statutes in

question were repealed by the act of 1871, No. 42, section 102, which is as follows :

"That all laws, or parts of laws on the subject of raising revenue, or the administration or collection of the same, contrary to or inconsistent with this act, be and the same are hereby repealed."

The law under which defendant proceeded related exclusively to the collection of the license tax from transient persons; and we find nothing in the act of 1871 respecting such persons, or the collection from them of the license tax; nor is there anything in section 3330 of the Revised Statutes contrary to or inconsistent with the act of 1871.

We are not informed as to the date at which the sale was made by the tax collector; but he testified that he advertised and sold according "to law." This is not material; since there is no complaint that the property was sacrificed, or that the sale was premature; nor would any irregularity in the sale vitiate the legal seizure of the property.

Plaintiff relies, mainly, on section 8, clause 3, article 1, of the constitution of the United States, which vests in Congress, exclusively, the power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

We do not think the facts of this case raise any Federal question whatever. Plaintiff had the right to navigate freely the Mississippi river; to land his boat, and to discharge and to receive cargo for transportation as a carrier; but when he undertook to sell his goods, to peddle them from one end of the State of Louisiana to the other, on the borders of the river, he was bound to submit to the same regulations which our laws impose on our own citizens, pursuing that precise business. It is wholly immaterial where the owner or the goods come from: once in the State of Louisiana with them, to be sold to such as will buy, in such quantities as they may require, wherever a market can be found, the trader becomes a peddler, whether he pursue his calling on a boat, or in a vehicle, or on horseback, or on foot. It is only those who carry their goods about in boats or watercraft, who are subject to the license tax of \$100, as peddlers, which is imposed, without discrimination, on all who fall within that class.

The State may not levy a tax on goods merely passing through to an ultimate destination, or sent here for sale; nor on imports; but he who pursues the business of selling such goods, come whence they may, can claim no exemption from the general laws of the State, which impose the same license tax on all who pursue that business, citizen of this State or of any other State, or unnaturalized foreigner.

We find no error in the judgment appealed from; and it is affirmed with costs.

No. 5970.

E. G. DUREL ET AL. VS. OTTO M. TENNISON.

Where the ownership of property is claimed on the ground of continuous, peaceable possession as owner for thirty years, on the part of the claimant and his authors, the claimant is entitled to introduce in proof of his title, a declaration made by his vendor in an act of sale to him of contiguous property, to the effect that he (the vendor) had been in peaceable possession of the property presently in question, and that he transferred to the claimant the rights which he, or his preceding vendors had in the property in question.

Such claimant is also entitled to introduce parol proof to show that both he and his vendors and authors had possessed during the time, and under the conditions required for the prescription of thirty years.

A PPEAL from the Fifth District Court, parish of Orleans. *Cullom, J.*

Guy Duplantier for plaintiffs and appellees.

Frank C. Zacharie for defendant and appellant.

The opinion of the court was delivered by

WHITE, J. The plaintiffs brought a petitory action to recover four lots of ground, situate in this city, in the faubourg Pontchartrain, designated by the numbers eleven, twelve, thirteen, and fourteen, on a plan drawn on the eleventh of September, 1836, by L. Surgi, and deposited in the office of H. Pedischaux, late a notary in the city, and known as plan No. 2.

The defendant answered by a general denial, and averring that either through himself or his authors, from whom he derived title, he had been in undisputed possession of the property claimed continuously as owners for thirty-five years, he pleaded the prescription of thirty years.

The judgment below was in favor of plaintiffs.

In consequence of our opinion as to the incorrectness of certain rulings of the lower court, we will remand the cause.

The defendant offered his title to property contiguous to that claimed by plaintiff, which title contained the following declaration made by his vendor: "That ever since the purchase of the afore-described property," that conveyed by the act, "he has been in the peaceable possession and enjoyment of a certain portion of ground," etc., giving a description of the property presently in question, "and he does hereby transfer and set over unto the said purchaser, his heirs and assigns, the rights and pretensions which he or his preceding vendors have or may have in and to the aforesaid portion of ground."

He then offered his chain of title to the contiguous lots, conveyed to him by his vendor, by the act containing the recital just mentioned, in order thereby to lay proper foundation for parol proof, showing that

he and his authors had always uninterruptedly, unequivocally, and quietly possessed as owners the property in controversy, which adjoined that covered by the tendered titles; which evidence was not allowed, on the ground "that the titles did not mention or relate in any manner to the four lots in question, they could therefore afford no evidence of title to them, the lots mentioned in them are not the subject of this investigation."

The defendant then tendered witnesses to prove that his vendors and authors had possessed during the time, and under the conditions required for the prescription of thirty years, not only the lots covered by their titles, but those now claimed, which possession had been regularly taken up by each succeeding holder of the chain of title previously offered. The testimony was disallowed, on the ground that proof of such possession must be in writing, and that although the possession of the immediate author might be shown, that of a series of authors could not. Both rulings were erroneous. 1st. The titles were not offered to establish written title to the property, but in order by parol proof to show possession by the authors of defendant of the property sued for *not under their titles but beyond them*. The maxim "*ad primordium tituli posterior semper formatur eventus*" simply fixes the quality of the possession by the nature of the title, and does not prevent one holding a title as owner from prescribing, not against but beyond his title. The Roman law, wherein the maxim took its birth, was explicit. Digest *pro emptore* law 2, sec. 6; and such is the text of our Code. C. C. 3514. This being true, it was surely competent for the defendant to make proof of the matter tendered in order to link the possession of his authors to his own, and thereby to establish with the assistance of parol proof his plea of prescription. C. C. 3493.

2d. That parol proof is admissible to show possession as a means of establishing the prescription of thirty years, under C. C. 3499, is no longer an open question—12 M. 649; 19 L. 258; 5 A. 231—and our jurisprudence is in accord with the views of the expounders of provisions of law similar to our own. Pothier, vol. 9, Nos. 176, 178; Merlin Repertoire, vol. 24, p. 134; Laurent, vol. 32, sec. 343. It is equally clear that the defendant was entitled to show the possession of his authors, and was not confined to that of his vendor. C. C. 3459. The fact that the article uses the singular instead of the plural in saying "that a possessor is allowed to make the sum of possession necessary to prescribe by adding to his own possession that of his author," is of no significance. C. C. 3356. In fact the right to avail oneself of a series of possessions was recognized by the Roman law at the very birth of the thirty years' prescription. Pothier's Pandects, book 41, tit. 3, vol. 17, p. 148.

But it is contended that the property covered by the deeds being other

Durel et al. vs. Tennison.

than that sued for, and hence that the vendors of the defendant were, in legal purview, his authors only *quoad* the property by them sold him, and not such authors as regards the contiguous property which they may have possessed beyond their titles. This is a mere *petitio principii*, for while it is elementary that in order to avail oneself of a previous possession there must be a juridical link between such possessions, it is textually provided by our Code that an act of sale creates such link. C. C. 3494. The various vendors in the chain of title were the authors of defendant, not only in reference to the property sold, but their possession beyond their titles was the possession of his authors, which was competent to be shown. To hold the converse would be to say not only that one could not prescribe beyond his title, but also that title was an essential basis for the prescription of thirty years.

The judgment is reversed, and the case is remanded to be proceeded with according to law and in conformity with the views hereinabove expressed. The costs of appeal to be borne by plaintiff; those below to abide the final result.

No. 5838.

W. A. BARTLETT vs. C. J. WHEELER.

A person who has formerly resided in this State but who has departed, and resided with his family in other States for several years; leaving no known agent here, is an absentee, and may be brought into court by a *curator ad hoc* appointed by the judge of the parish where he has property.

A *curator ad hoc* can validly acknowledge in writing service of petition and citation addressed to him as such, and such acknowledgment brings the defendant into court, and interrupts prescription.

The motion made by a judgment debtor to annul the judgment for want of jurisdiction because he resided in another parish, made actual citation unnecessary, and cured the defect if there had been no citation.

The judgment of the court, rendered without opposition on a motion to annul a judgment for want of jurisdiction, is *res adjudicata* on the question of jurisdiction.

A PPEAL from the Sixth District Court, parish of Orleans. *Saucier, J.*

B. R. Forman and Jas. Ligan for plaintiff and appellant.

Leovy & Kruttschnitt for E. J. Hart, appellee.

The opinion of the court was delivered by

MARR, J. In April, 1866, Wheeler brought suit against Bartlett in the Second Judicial District Court, for the parish of Jefferson, to re-

Bartlett vs. Wheeler.

cover the amount of two promissory notes, payment of which had been assumed by Bartlett; and to enforce the vendor's mortgage and privilege on property in Jefferson City by which they were secured.

On affidavit that Bartlett was absent from the State, and had left no known agent to represent him, a curator *ad hoc* was appointed, who answered to the merits, prefacing the general denial with the statement that he had been "duly appointed *curator ad hoc* to represent the absent defendant herein, having been duly cited." The case was tried: the demand was proven by two authentic acts, and the two promissory notes; and judgment was rendered in favor of Wheeler against Bartlett in accordance with the prayer of the petition.

Before this judgment became final, counsel of Bartlett took a rule on Wheeler to show cause why it should not be annulled and set aside on the grounds:

1st. That the said Wm. A. Bartlett, the defendant therein, was at the institution of this suit, and is at this time, a resident of the parish of Orleans and city of New Orleans, and was, and is entitled to be sued only in personal actions before the judge of the parish of his domicile.

2d. That being a non-resident of the parish of Jefferson, at the institution of this suit, *he is not bound* by the proceedings herein, this court being without jurisdiction in the premises for the reasons stated.

On the trial of this rule the counsel who represented Bartlett, and who was the only witness, testified as follows:

"I know that Wm. A. Bartlett was domiciled in the parish of Orleans, in the city of New Orleans, and that he lived there for over fifteen or twenty years with his family. He was in business there up to the year 1862. In the spring of 1862 he left New Orleans with his family, took them to Mississippi, afterwards returning himself to attend to some unfinished business; but since that time he has lived in Georgia, North and South Carolina, Alabama and Virginia.

"I know he has never acquired a domicile in the above named States; that since the close of the war he returned to New Orleans for a few weeks, and while here, and since that time in letters to me, has expressed his intention of returning to the city of New Orleans and of resuming his business."

Cross-examined.

I know Mr. Bartlett to have been a resident of the city of New Orleans in the year 1862. Since the occupation of the city by the Federal troops he has been here but once to my knowledge, and remained here about three weeks.

"Mr. Bartlett has no agent in the city of New Orleans or in the State of Louisiana to my knowledge except myself for certain purposes, numerous ones, but not referring to this property.

"I think his last place of residence was on Felicity Road, near the corner of Camp street, previous to the occupation of the city by the Federal troops; and his place of business was No. 81 Gravier street. He is now in Tennessee, New York or Virginia.

"He has not lived in New Orleans or the city since its occupation by the Federals. He has not kept house in said city, nor carried on business since the occupation of it by the United States forces in 1862."

This testimony was given on the 6th of June, 1866, and on the 16th June, after an elaborate opinion, the judge being satisfied that the judgment rendered contradictorily with the curator was "valid and binding upon the absentee as far as it can be executed upon the property thus specially affected in favor of the creditor," dismissed the rule; and on the 21st June he signed the judgment rendered 28th May in favor of Wheeler against Bartlett.

No appeal was taken; and no further opposition was made. Execution issued, and the mortgaged property was seized and sold by the sheriff, and was adjudicated and conveyed to Wheeler in September, 1866. In June, 1867, Wheeler sold it to Burthe; and in August, 1867, Burthe sold it to E. J. Hart.

In November, 1869, Bartlett brought suit against Wheeler to have the judgment under which the property was sold annulled, and to recover the property and \$500 damages. The alleged grounds of nullity are:

1st. Want of jurisdiction; because of Bartlett's domicile being in the city of New Orleans.

2d. That the curator *ad hoc* was not cited.

The case was transferred to the Sixth District Court of Orleans, pursuant to the act of 1870, p. 105, section 5; and in November, 1872, a supplemental petition was filed making E. J. Hart a party. Hart set up several exceptions and pleas; and he also answered to the merits; calling his vendor, Burthe, in warranty. Wheeler also appeared and answered through the curator *ad hoc* appointed to represent him. Without stating the pleadings in detail, we shall proceed to consider such points as we think determinative of the cause.

1st. Bartlett was an absentee, in the sense of the law, and the court of the parish in which the property is situated had the power to appoint a curator *ad hoc* to represent him.

"An absentee is a person who has resided in the State, and has departed without leaving any one to represent him." R. C. C. art. 3556, No. 3.

He left New Orleans with his family in 1862; and up to June, 1866, his family had not returned, and he had been at New Orleans once only, and remained about three weeks. He had no known agent in the State.

Bartlett vs. Wheeler.

The court within whose jurisdiction the property of the absentee is situated, alone has the power to appoint a curator *ad hoc* to represent him, and the judgment rendered contradictorily with the curator may be executed on that property. O'Hara vs. Connell, 29 An. 821.

The plaintiff must demand that a curator *ad hoc* be named to defend the suit, "if the person intended to be sued be absent and not represented in the State." C. P., art. 116.

2d. The sheriff's return shows that he served on W. T. Scott, on the 11th April, 1866, a copy of the petition and order of the court appointing "W. T. Scott, Esq., attorney-at-law, curator *ad hoc* to represent the absent defendant, Wm. A. Bartlett;" and Scott's answer, in his capacity as curator *ad hoc*, filed on the 18th May, acknowledges that he had been duly cited.

In Millaudon vs. Beasley, 2 An. 916, it was held that a curator *ad hoc* could validly acknowledge, in writing, service of petition and citation; and that such acknowledgment brought the defendant into court and interrupted prescription.

3d. The motion to annul and set aside the judgment for want of jurisdiction, because of defendant's alleged domicile in New Orleans, was an appearance, which made actual citation unnecessary, and cured the defect if there had been no citation. Dunbar vs. Owens, 10 Rob. 140; Succession of Penny, 11 An. 197.

4th. The question of jurisdiction was determined on that motion; and the judgment is *res adjudicata*. That motion was an informal action of nullity, to which Wheeler might have objected. He did not choose to do so, but tried the issue in that form. In Plicque vs. Perret, 19 La., 328, the court said: "No matter in what form of action or proceeding, whether by petition or exception, or intervention, the question may have been presented, if the same question, once judicially decided between the parties, be again agitated, it is sufficient to create the presumption resulting from the thing adjudged, and forms a complete bar:" and in Prescott vs. Lane, 12 An. 198, the court said:

"It matters not that the proceeding by rule was irregular, since the party against whom it was taken waived all questions of form, and joined issue on the merits. The form of procedure is immaterial; if proper parties join issue upon questions either of law or of fact, before a competent court, they must abide by the decision."

Wheeler did not except to the rule, but appeared, cross-examined the witness, and tried the case. This was an effectual waiver of the question of form: the issue of nullity for want of jurisdiction was finally disposed of on the questions of fact and of law, in this informal manner; and the judgment is conclusive.

He who provokes a judicial decision in any form, cannot be heard

Bartlett vs. Wheeler.

afterwards to object to that form. At the time this suit was brought Bartlett had no power to controvert the validity of the judgment in favor of Wheeler; and it concludes him on all the questions upon which he relies.

The judgment appealed from is affirmed with costs.

Rehearing refused.

No. 7327.

THE STATE VS. J. L. GISCH.

The title of the law enacted by the Legislature of 1878 (Sess. Acts, p. 152), authorizing the city of New Orleans to regulate private markets, etc., sufficiently expresses the object of the law.

A municipal corporation, under legislative permission, can forbid the opening of markets, except at designated places, and such forbidding is an exercise of its power to regulate markets.

There is no unconstitutional discrimination in forbidding markets within certain prescribed limits, and imposing a license on all who keep markets outside of those limits.

Where the legality and constitutionality of a fine and penalty, imposed by a city ordinance, is in contestation, this court has jurisdiction irrespective of the amount in dispute.

A PPEAL from the Fifth Justice's Court, parish of Orleans. *Zarrazin, J.*

E. H. McCaleb, City Attorney, for plaintiff and appellee.

A. & W. Voorhies for defendant and appellant.

The opinion of the court on the original hearing was delivered by *MANNING, C. J.*, and on the rehearing by *DEBLANC, J.*

MANNING, C. J. The defendant was arrested and fined for a violation of the City Ordinance prohibiting private markets to be kept within a radius of six squares of any public market. That Ordinance was passed under the authority of a law of 1878. Sess. Acts, p. 152. The law is attacked for unconstitutionality, in that its object is not expressed in its title.

The title is comprehensive, and sufficiently suggests the subject matter of the legislation. The special objection appears to be that an Act, conferring the power to regulate private markets does not include the power to prohibit them. The law of 1878 limits the power of prohibition, before exercised by the City, and confines its exercise within certain bounds. There can be no doubt that the City, under legislative permission, can forbid the opening of markets except at designated places, and such forbidding is an exercise of its power to regulate markets. Mr. Dillon thus states the source of the power, and its extent;—

"The States under their police power, may delegate to municipal corporations the authority to establish, or authorize the establishment of markets; and it is competent to such corporations under proper grants of power to enact ordinances forbidding sales and purchases of marketable articles, except at designated market places. * * *

* * * In this country, the practice is almost universal on the part of the legislature to confer upon the municipal agencies more or less authority with respect to markets and market places, and such grants are not so strictly construed as those which invest the corporation with powers of a more extraordinary or unusual character—at least such is the case, unless a monopoly in favor of private individuals is sought to be sustained against which the Courts strongly lean." Munic. Corp. § 313.

In an early case this court said, in establishing markets, the City Council can designate certain spots or places for the sale of certain articles of provision, and it has an undoubted right to prevent the violation of ordinances it may pass in establishing markets. *Morano v. Mayor*, 3 La. 217. Later, the right to prohibit the sale of particular things was considered and maintained. *Municipality v. Cutting*, 4 Annual, 335. The question presented here came up directly in *New Orleans v. Stafford*, 27 Annual, 417, where the same objections were made to the Act of 1874 that are now made to that of 1878. The former act prohibited private markets within twelve squares of a public market. The later act diminishes the distance, and thereby gives a larger liberty. The dissenting opinions in that case were based upon a feature of it—the violation of a vested right—which this case does not contain. The principle, that under the power to regulate markets the City can prohibit their establishment in particular localities, or within a given radius of them, is approved by writers of reputation, and has been sanctioned by judicial decisions, and is recommended by the necessity for its exercise in the interests of health, comfort, and cleanliness.

The defendant also attacks the Ordinance as unconstitutional, because it discriminates between those who keep private markets within six squares of a public market, and those who keep without six squares of one, because it imposes a license on the latter of \$300, and does not impose any upon the former. It imposes no license on the former, but a prohibition instead, and a fine for its violation. The City has the unquestioned right to impose a license, and when she prohibits a particular traffic within prescribed boundaries, is not guilty of the inconsistency of licensing that traffic within those boundaries. There is no discrimination between those who are permitted to carry on the traffic.

The defendant also denies that a criminal prosecution to enforce the payment of a fine is warranted by law, and insists that the remedy

The State vs. Gisch.

should be sought by civil proceedings in an action *qui tam*. The proceeding is to enforce an ordinance of a municipal corporation, and the legality and constitutionality of a fine, imposed under it and for its violation, is the matter in contestation. It is that feature that gives us jurisdiction.

The act conferring power on the City to regulate markets being constitutional, and the ordinance exercising that power being legal, the fine was properly imposed, and therefore

The judgment is affirmed.

ON APPLICATION FOR REHEARING.

DEBLANC, J. We do certainly not underrate the importance of this cause; but we do not enact, we construe the laws enacted by others. To the Legislature alone, and not to courts, must the inhabitants of the State apply to obtain redress against laws which—though constitutional—affect their interests.

We have demonstrated—and it was not a difficult task—that the statute of 1878 and the city ordinance passed under its authority, do not—as charged—violate any constitutional provision, and if they are as unjust as represented, those who are made to suffer by their execution, should apply—for their repeal—to the Legislature or the Council. They are too plain to justify the hope of any successful resistance to their enforcement.

That our jurisdiction does extend to this cause, we neither do nor can entertain any doubt. The assailed ordinance imposes a *fine* and a *penalty*, the legality and constitutionality of which are contested by defendant, and the Constitution provides “that the jurisdiction of this court shall extend to all cases in which the constitutionality or legality of any *fine* or *penalty* imposed by a municipal corporation, shall be in contestation.” C. art. 74.

The rehearing is refused.

No. 7466.

J. GARCIA Y LEON VS. LOUISIANA MUTUAL INSURANCE COMPANY.

All rules or proceedings to traverse, or disprove the answers of a garnishee, either under a writ of attachment, or *feri facias*, are prescribed after twenty judicial days from the filing of the garnishee's answers.

A PPEAL from the Third District Court, parish of Orleans. *Monroe, J.*

George L. Bright for plaintiff and appellant.

J. Ad. Rozier and *J. W. Thomas* for garnishee, appellee.

The opinion of the court was delivered by

WHITE, J. On the eleventh of November, 1874, plaintiff sued de-

fendant in the late Superior District Court. The petition contained a prayer for an attachment, and that E. K. Bryant, among others, be made garnishee; the prayer was for judgment against the defendant and garnishees, E. K. Bryant being among the number, with lien and privilege on the property attached. E. K. Bryant was served with the usual interrogatories on the 17th of November, 1874; on the 27th of that month he answered as follows :

To the first question, which was couched in the usual printed form, and called upon him to answer whether he had under his control directly or indirectly any money, rights, credits or other property whatsoever directly or indirectly belonging or due to the said defendant in execution, etc., the question concluding with, "you being asked to make full disclosure in answer to the same," he said: "That at the date of the service of these interrogatories affiant was one of three liquidators appointed to wind up the affairs of the Louisiana Mutual Insurance Company, when the assets of said company were placed under charge of affiant and his co-liquidators; subsequently these assets have been taken out of his charge by the appointment of a receiver by this honorable court, and he is unable to give a list or valuation of the same."

To the second question, likewise framed in the usual form, and asking if he was indebted in any way, etc., and requiring full disclosure, he answered, "No."

To the accustomed third interrogatory he answered, also, "No."

On the 27th November, 1874, R. S. Howard, receiver of the Louisiana Mutual Insurance Company, answered by a general denial. Judgment was rendered below against the company, and on appeal this court amended the decree by allowing the plaintiff a privilege on the property attached. The present controversy results from a rule taken on the 10th February, 1879, against E. K. Bryant, garnishee, directing him to show cause on Thursday, February, 27, among other things, "why the same judgment rendered against the defendant should not be rendered against him on the answers filed by him; and because he has neglected and evaded and failed to answer some of the interrogatories propounded to him." Bryant excepted by pleading to the jurisdiction of the court. He charged the absolute nullity of the judgment against the defendant company, owing to want of jurisdiction in the Superior District Court to entertain a demand against a corporation not established by legislative act. He further excepted by pleading the prescription of twenty judicial days. The lower court maintained the first exception, and dismissed the rule, whereupon plaintiff in rule appealed. The opinion we have formed as to the plea of prescription will render it unnecessary to pass upon the many other questions presented by counsel.

García y Leon vs. Louisiana Mutual Insurance Company.

Act No. 27, approved March 28, 1877, provides as follows: "That hereafter in all cases where plaintiff desires to disprove or traverse the answer to interrogatories propounded to a garnishee, under a writ of attachment or of *feri facias*, he shall, within twenty judicial days after said garnishee shall have filed his said answer, file a rule in court, or institute other proceedings against said garnishee for the purpose aforesaid; and upon the failure of said plaintiff to file a rule or institute other proceedings as aforesaid, any property, rights or credits, in the hands of said garnishee shall, by the mere fact of said failure, be considered as released from seizure under said writ of attachment or *feri facias*."

The answers of the garnishee were filed, as we have seen, on the 27th of November, 1874, and the rule now before us only on the 10th February, 1879. It is urged that the provisions of the act of 1877 do not apply. 1st. Because its terms only reach process initiated subsequent to its passage. 2d. Because this proceeding is not a traverse of the answers of the garnishee, but simply an effort to have his liability fixed, growing out of his failure to answer directly, or the evasiveness of the answers filed.

Neither of the propositions are tenable.

1st. The language of the statute is unambiguous, and leaves no room for construction. It does not say "in all garnishments hereafter issued," but it declares in unequivocal language that "hereafter in all cases where plaintiff desires to traverse, etc." We think it bars the plaintiff's rule if within its scope.

2d. Grant the theoretical correctness of the distinction between traverse and an attempt to hold the garnishee for not answering or evading—in other words, taking the interrogatories for confessed. The present case is clearly a traverse, because on the face of the interrogatories the garnishee cannot be made personally liable. There were three interrogatories, all of which were answered. To the first, as we have seen, the answer was that, as one of three liquidators, not individually, the garnishee controlled the assets of the company, that subsequently the assets, all of them, were taken from the board, of which he was one, by the court from which the garnishment issued, and he was therefore unable to give the list asked. Can it be contended, taking this answer for truth, the garnishee could be condemned *personally*? We think not. The other interrogatories were answered No, and clearly such answer must be disproved before the garnishee can be made liable.

Judgment affirmed.

Rehearing refused.

No. 5977.

PAUL JULES FAZENDE VS. CHAS. MORGAN.

The grant of a right of way to a railway company, made by an owner of land by public act, in which act he sets forth the probable increased value of his land, on account of the building of the railroad, as one of the causes of the grant, is not a gratuitous donation. It is a transfer based on a valid consideration, and can not be revoked by any *ex parte* act on the part of the grantor for any of the causes which warrant the revocation of a gratuitous donation.

The grant of a right of way for as many tracks as the business of the grantee, a railroad company, may require is not necessarily exhausted by the laying of one track. Such a grant includes the right to lay as many tracks as the evidence shall show that the business of the company require.

The acceptance of a grant of the right of way by the grantee need not be evidenced by an authentic act. Actually using the right in part; for a number of years is admissible in proof, and is conclusive evidence, of its acceptance, as to the entire extent of the grant.

Prescription must be specially pleaded, or it will not be considered.

APPEAL from the Second Judicial District Court, parish of Jefferson.
Pardee, J.

Frank Michinard for plaintiff and appellant.

Leovy & Kruttschnitt for defendant and appellee.

The opinion of the court was delivered by

DEBLANC, J. On the 14th of October, 1852, and by act under private signature, plaintiff granted to the New Orleans, Opelousas and Great Western Railroad Company, a right of way through his land. The extent of that right is fixed in the act of 1852, the first and principal clause of which is as follows :

"Be it known and remembered, that whereas the New Orleans, Opelousas and Great Western Railroad Company are now locating and about constructing their railroad, beginning in the town of Algiers, and whereas said line of road passes through the land or plantation owned by the undersigned, and whereas the construction of said railroad by the President and Directors of the New Orleans, Opelousas and Great Western Railroad Company *through our said land or property, will add to its value: therefore, in consideration thereof*, and the pride we take in so great a work, to the honor of our State, the undersigned do agree and do hereby donate and grant, free of all damage or costs, the right of way for the said railroad through the said land or plantation, unto the president, directors and company, and to their successors in office, in conformity with their charter, as long as the same may be required for the use of the company, and no longer; it being agreed and understood that no more land is to be reserved for the use of said road than is absolutely necessary for the convenient and safe transit of the locomotives and cars, *over as many tracks of rails as the business of the com-*

pany may require; also, there is hereby granted a sufficient quantity of land for a station-house, water-tank, or depot, not exceeding one acre of land on the immediate line of road, should the convenience of the road require it," etc.

In 1875, Charles Morgan, who—in 1869—had purchased the New Orleans, Opelousas and Great Western Railroad and its franchises, was about laying an additional track or switch on the land described in the act of the 14th of October, when he was enjoined, by plaintiff, from proceeding so to do, on the ground that he—plaintiff—is the owner of the land on which the track or switch was about being laid; and that—unless enjoined as prayed for—defendant would cause him an irreparable injury.

The lower court dissolved the injunction provisionally granted to plaintiff, and he appealed.

To defeat the injunction, defendant relies on the act of the 14th of October 1852, which—on the 12th of December, 1874, and without alleging any reason for the course which he then pursued, plaintiff attempted to revoke by an act passed before a notary of this city. He—in that act—acknowledged that, in 1852, he made a *valid* donation to the railroad company, then denied the validity of what he calls "the pretended donation," and concluded by the declaration that, if it was ever validly made, he revokes it and resumes the full and unimpaired ownership of his land.

In his pleadings, the only facts alleged by plaintiff to obtain the injunction, are: that he is the owner of the land on which defendant was—at that time—preparing to lay an additional railway. He—in no part of those pleadings—alludes to what he himself styled a valid donation, nor to its attempted revocation, nor to the nature of the irreparable injury which he swore he would suffer on account of the proposed construction of a switch on his land.

In the brief submitted by his counsel, he contends:

1. That the donation made by him to the railroad company, has none of the requisites prescribed by the Civil Code, and—for that reason—is stricken with nullity.

2. That—if it is not null—the company has, some twenty five years ago, exhausted the rights acquired under the donation, when it laid its first track on the land.

3. That said donation never was accepted according to law.

4. That—if it was accepted, it merely imposed a servitude, which has been extinguished by its non-usage for more than ten years.

1. Does the act of the 14th of October evidence a *grant*, or—as urged—a *donation inter vivos*? It recites that Fazende—in consideration of the value it would add to his land, and the pride which he took

in the great work then contemplated and long since executed, donated and *granted*, free of all damage and costs, *the right of way* through said land, no more of which was to be reserved than is *absolutely necessary* for the *convenient and safe transit* of the locomotives and cars over as many tracks of rails as *the business of the company may require*, and he also *granted* a sufficient quantity of land for a station-house, water-tank, or depot.

The act of 1852 does not evidence either a gratuitous, onerous or remunerative donation, but a *grant* of the use of the quantity of land absolutely necessary for the purposes therein specified. As to the consideration of that grant, it was the reasonable hope expressed by the owner, that the railway—when built—would add to the value of, and benefit the very tract from which the necessary quantity was to be taken by the company. Such a consideration is undoubtedly valid, when the owner himself declares it to be, and accepts it as sufficient; and—in several of our States—is now regarded in fixing the compensation to be allowed in cases of expropriation.

Southern Law Review, April, May, 1879, pp. 37 and 38, and authorities therein cited.

In the act from Fazende to the company, what did he expressly give and grant? The use of a certain quantity of land for the safe and convenient transit of locomotives and cars, on as many tracks of rails as *the business of the company may require*—and, besides, for a station-house, water-tank, or depot. The importance of this grant can not be underrated, but its importance flows from plaintiff's consent, and a right acquired from one who had the capacity to contract, can not be destroyed for the sole reason that it was imprudently conceded.

2. The evidence taken on the trial does not sustain the defence that the rights granted by the act of 1852 have been exhausted: but one track of rails has been laid on the land, and—according to the terms of the act—the privilege allowed is that of “laying as many tracks of rails as the business of the company may require, and of building a station-house, water-tank, or depot.”

Does *the business of the company require* the additional track, the construction of which has been enjoined by plaintiff?

The superintendent of the railroad swore that the additional track is of paramount necessity, and his assistant that it is necessary to a proper running of the trains. Their declarations stand uncontradicted by either Mr. Fazende or his son, who both testified in his behalf.

As to the company's acceptance of the entire grant of the 14th of October 1852, though not evidenced by an act passed before a notary and two witnesses, it has been—for upwards of twenty five years—and still is daily proclaimed by the whistles, the bells and rattling of its

Fazende vs. Morgan.

trains, and that acceptance can not be restricted to exclusively those clauses of the contract which have already been executed, but extends to and embraces those clauses, the execution of which was made to depend on the happening of a suspensive condition.

The prescription of ten years is invoked, but in exclusively *the brief* of appellant; and—were it applicable—could not be considered.

We believe, as does plaintiff's counsel, that the right of property should be sacredly protected against caprice and speculation, and that not an inch of land should be subjected to a servitude, until the owner has first received an equivalent for that which he surrenders—nay more: we believe as did the eminent English statesman who said: "There stands the poor man's cottage; the rains of summer and the snows of winter may enter its crevices, but the king of England, with all its forces, dare not enter the poor man's cottage."

That right which—on proper occasions—should be protected against the caprice of kings and States, the speculations of corporations and individuals, can not be protected against either the liberality or imprudence of freeholders.

As to the plaintiff's apprehensions that, after the construction of the switch, his field and garden would be exposed to constant depredations, they may be unfounded. Were they hereafter verified, defendant might be made to realize that a servitude can not—with impunity—be converted into a nuisance, and must ever be exercised with a careful regard for the rights of others.

It is—therefore—ordered, adjudged and decreed that the judgment appealed from is affirmed with costs.

No. 7477.

JOHN T. NOLAN VS. SUCCESSION OF JOHN H. NEW.

Where a surviving father joins in the petition of the universal legatee of his deceased daughter, praying that the universal legatee be recognized as the owner of all her estate, and be put into possession of the same, he thereby effectively renounces his right of action to have his daughter's legacy reduced to the disposable portion of her estate. Such action on the father's part amounts to a ratification of the donation made by his daughter to his prejudice, and he is thereafter estopped from contesting the validity of the donation.

A PPEAL from the Second District Court, parish of Orleans. *Tissot, J.*

Hornor & Renedict for plaintiff and appellant.

Moise & Bassich for succession, appellee.

The opinion of the court was delivered by

DEBLANC, J. Mrs. New died on the 1st of July 1874; her father—

John T. Nolan—was, then, her only surviving ascendant and forced heir. By her last will, she instituted her husband as her universal legatee, and to his love and protection recommended her father and sisters.

On the 15th of January 1877, John H. New filed, in the Second District Court, a petition in which he prayed :

1. That said will—which had already been probated—be executed, and he recognized as the universal legatee of his wife, and owner of all her estate, real and personal ; and

2. To be—as such—put in possession of said estate.

At the foot of that petition, plaintiff wrote: "I—John T. Nolan—of Dallas, Texas, father of the late Josephine G. New, and only ascendant, hereby join in the prayer of the above petition."

His signature to that document is properly authenticated.

John H. New died on the 17th of January 1879, and Nolan—as forced heir of his deceased daughter—claims from the succession of his son-in-law, and as the legitimate portion of which his daughter could not dispose to his prejudice, the sum of ten thousand dollars.

To sustain his demand, and in answer to the several defences urged against it, plaintiff's counsel contend :

1. That he could not have prevented the legatee from being sent in possession, and that no one is presumed to give.

2. That, as an heir, he could have renounced to the rights which he is now seeking to enforce, but by public act, in presence of two witnesses.

C. C. 1017 (1010).

We do not presume that plaintiff gave what he now claims, but it is manifest that he did ratify the donation from his daughter to New. That donation was not null, but only reducible to the disposable portion, and—to reduce it—he, as a forced heir, had an action derived from the law; and when he joined New, in the latter's application to be recognized as the universal legatee of his wife and as owner of her estate—real and personal—he undoubtedly renounced to the action which—at that very time—he could have exercised to reduce the legacy from the wife to the husband.

The last will of Mrs. New was probated on the 17th of October 1874, and—on the 16th of January 1877—by a decree of the Second District Court, partly based on the express consent of the father and forced heir, the husband was—as universal legatee—put in possession of the entire estate.

The decree of the 16th of January is not assailed—nor is it alleged that plaintiff's consent to the rendition of that decree, was obtained by any deception on the part of New, or given through error. The uni-

versal legatee sent to Texas the petition at the foot of which we have found the document already noticed, and which—we are bound to presume—plaintiff willingly signed, after he had read the petition itself, which contains a copy of the last will of his daughter, the mention that it was probated on the 17th of October 1874, and the prayer that he—John H. New—as universal legatee of his wife—be decreed to be the owner, and—as such—put in possession of the whole of her estate.

Plaintiff acted deliberately, with full knowledge of the nature and extent of his rights, fully informed as to the rights which were and could be acquired by the legatee of his daughter and under her will, and his act is not susceptible of adverse constructions. If it were, his unbroken silence since 1874—when his action accrued—until 1879, when it was instituted—would contribute to convince us that—as he did in plain and positive terms—his intention was to ratify a donation which was merely reducible, and the reduction of which he alone could—legally—have asked and obtained.

C. C. 1503 (1490)—1504 (1491).

The Code provides that “the confirmation, ratification, or voluntary execution of a donation by the heirs or assigns of the donor, after his decease, involves their renunciation to oppose either defects of form, or any other exceptions; and that, when there are heirs to whom a portion of the property is reserved by law, they are seized of right—by the death of the testator—of all the effects of the succession, and the universal legatee is bound to demand of them the delivery of the effects included in the testament.”

C. C. 2274, (2254)—1607, (1600).

Instead of joining New in his demand for the delivery of the property—real and personal—belonging to the succession of his wife—could not plaintiff have opposed, to that demand, the plea that he was a forced heir of his daughter, and—as such—authorized to retain, as his own, the excess of the disposable *quantum*? He certainly could—but did the very reverse: he ratified the donation—and as, according to the jurisprudence of our State, it is only the dispositions reprobated by law which—in regard to wills—can neither be confirmed nor ratified, plaintiff has—by his express consent to the delivery of the entire estate of the testatrix, and by aiding in the unrestricted execution of her testament, lost, or rather abandoned his action to compel the reduction of a donation, which embraced both the *légitime* and the disposable *quantum*.
15 A. 154.

It is—therefore—ordered, adjudged and decreed that the judgment appealed from is affirmed with costs.

Succession of Henry.

No. 7497.

SUCCESSION OF WALTER HENRY.

The Public Administrator is not entitled to the administration of a succession when the attorney in fact of an heir, especially if the heir be present, applies for the administratorship, and tenders the requisite security. In such a case the lower judge exercises the discretion vested in him soundly, by appointing the agent of the heir.

A PPEAL from the Second District Court, parish of Orleans. *Tissot, J.*

Robt. Mott and Francis B. Lee for the public administrator, appellant.

John and W. S. Finney for Trist, appellee.

The opinion of the court was delivered by

MANNING, C. J. Walter Henry died in Mexico, leaving property in New Orleans. His sister, Bridget Kelleher, lives here, and applied for administration, but it appears was unable to give bond. Shortly after this application was made, and before it was acted on, Nicholas B. Trist applied for administration, alleging that he was the attorney-in-fact and agent of Mrs. Kelleher, who was unable to give bond, and that her procuration empowered him to represent her in all matters touching this succession, and to accept it for her, but with benefit of inventory only, and authorized him to apply for administration in his own name. The public administrator opposed this application, and claimed the administration.

The Public Administrator is to be appointed to administer intestate successions, when there is no surviving husband or wife, or heir present or represented. Sess. Acts 1870, p. 120. He is also to administer vacant successions, but this is not in that class. An heir is present. And an heir being present, the applicant argues that because of that circumstance, the public administrator cannot be appointed.

The office of administrator was unknown to the civil law. It considers the heir the representative of the succession, and modifies his responsibility or changes his relation to it, as he shall have accepted it with or without the benefit of inventory. For successions that have no heirs present or represented, it appoints curators.

At common law, the heir had nothing to do with a considerable part of an estate i. e. the personalty. For the settlement of that, an administrator was always appointed, and when he paid over, after settling debts (if there were any) and costs and charges, it was to the distributees. These distributees might be, and were often the same persons as the heirs, but they were known by a different designation. So com-

Succession of Henry.

pletely did that system separate the heir, as heir and *eo nomine*, from the personality.

In our Codes, these two systems are partially blended, and the blending has not added to the simplicity of either. This composite nature of our law is perceived in all the articles of the Civil Code containing the regulations of the benefit of inventory and the delays for deliberating. The regulations are made for the heirs primarily, (arts. 1025—1033 new nos. 1032—1040) and then suddenly and by an abrupt transition, provision is made for an Administrator, and to all appearance without a new emergency or contingency occasioning it. art. 1034 new no. 1041. Among these rules is this;—If the beneficiary heirs are absent, but represented in the State, their attorneys in fact can claim in the name of their constituents, the preference for the administration over every creditor of the succession, provided they have a special power to accept or reject this succession, or a general power to accept or reject all successions which may fall to their principals. art. 1038 new no. 1045. In *Chew v. Flint*, 7 La. 395 this court said;—"This part of the Code regulates the administrations of successions accepted with benefit of inventory, and gives to the heir at law the preference over all others in the administration. He administers, not for the exclusive interest of creditors, but has in his own right the residuary interest in the estate. The Code therefore, even in cases of his absence, does not exclude him, but his attorney in fact is authorized to demand the administration in his name, on furnishing the necessary security." *Ibid.* 403. That this privilege is exceptional, and was not given to creditors was ruled in *Suc. Petit*, 9 Annual, 207, where it was held that an agent or attorney in fact of a creditor is not entitled to a preference over strangers. In *Suc. Bernard*, 3 Annual, 565, the court thought the appointment by the lower judge of a legatee as administrator, at the request of several of the heirs, was the exercise of a sound discretion, and in *Suc. Huie*, 23 Annual, 401, the heir had not requested the appointment of any one, but merely opposed the appointment of an applicant.

The Act of 1870 introduced a new aspirant for these appointments, and gives him the exclusive right to them in certain cases. One is, when there is no heir present. There is an heir present to this succession, and therefore the Public Administrator has not the right to this appointment. And if the Code does not exclude an heir from appointment as administrator, even in case of his absence, but authorizes his attorney-in-fact to demand it in his name, how much more does it allow such demand, when he is present. We say allow and not compel. For as this succession is not one of those that the Public Administrator is designated to administer, and the present heir is not an applicant for its administration, the case falls under the general laws for such appoint-

Succession of Henry.

ments, and the court having cognisance of the matter has a discretion to exercise, as in the Bernard succession.

The demand of the Opponent was properly rejected, and the discretion exercised by the lower judge in appointing the applicant, Trist, appears to be sound.

Judgment affirmed.

Rehearing refused.

No. 7091.

THE STATE EX REL. OGDEN, ATTORNEY GENERAL, VS. JUDGE SIXTH JUDICIAL DISTRICT.

Even after an appeal in a criminal case has been taken, the State may by a mandamus compel the lower judge to so amend and correct omissions in the minutes of the court, as to make them evidence facts admitted, or proven to have transpired during the course of the trial; as for example, to show that the defendant was present at his trial, and conviction.

APPPLICATION for a mandamus.

J. H. Muse for relator.

S. D. Ellis for respondent.

The opinion of the court was delivered by

DEBLANC, J. At a regular term of the Sixth District Court, held in the parish of Tangipahoa, one George Carroll was indicted for and convicted of murder. In obedience to the verdict, he was sentenced to death, and—from said verdict and sentence—took an appeal now pending in this court.

Acting under the mistaken impression that, on the hearing of a rule taken by the District Attorney upon the already condemned convict, the honorable William Duncan, the judge of the court before which Carroll was tried, had refused to correct clerical errors and omissions conclusively proven to have occurred during the trial, and which exist in the minutes of said court, the Attorney General applied for and obtained from this tribunal an order addressed to the district judge, calling on him to show cause why he should not comply with the application of the State attorney and correct said pretended errors and omissions.

In his answer, the judge admits that a rule was taken on the sentenced prisoner, and when—since the sentence—his court had twice adjourned *sine die*, notifying said prisoner to show cause why the minutes kept at his trial should not be corrected and altered so as to prove that he was present at his trial and conviction; but he says that—on the hearing of said rule—no testimony was offered or brought before

State ex rel. Ogden, Attorney General, vs. Judge Sixth Judicial District.

him, in his official capacity, either by affidavit taken *ex parte*, or in any other manner; and that, if any such was filed with the district attorney's application, he has never seen it or heard of it, and that none ever was produced before him as a judge, or otherwise.

The rule was excepted to by the prisoner's counsel, the exception taken up and argued, and considering—he avers—that the case of the State against Carroll had passed from and beyond his jurisdiction, and that he is now without power to *alter* the record of the trial, the judge—on this and on other grounds suggested in the prisoner's exception, dismissed the rule taken by the district attorney.

In this proceeding, the only parties are the Attorney General and the district judge—and the only documents placed before us are the former's application and the latter's answer. That uncontradicted answer contains the assertion that, on the trial of the dismissed rule, no evidence was introduced to prove the existence of the pretended errors and omissions, and—under these circumstances—the judge's decision was legal and proper.

There is no doubt that, as soon as the jurisdiction of the appellate court attaches, that of the lower court is superseded; but it is not so absolutely superseded that it cannot—after due notice to and in presence of the interested parties and their counsel—correct an erroneous entry, supply an important omission, and—on legal, sufficient and incontrovertible evidence—so amend its minutes as to make them correspond with facts *admitted or proven* to have transpired during the course of any trial.

Were it otherwise, after the filing of the bond and the issuance of the citation of appeal, the lower court would be divested of even the indispensable and conceded authority which it has ever exercised, of taking every necessary step to secure the transmission to this tribunal of a correct and complete record.

The rule filed by the district attorney is referred to, but it is not before us. In substance—according to the judge's answer, it is similar to that filed by the Attorney General, and—in both—what is asked? Not an adjudication on any point raised and not decided during the trial—not any addition to or reduction of any previous order or ruling, but—exclusively—that the *omitted evidence* of facts which transpired between the prisoner's arraignment and the sentence pronounced against him, and which the clerk failed to mention in the minutes, be now intercalated where it should have been inscribed during the progress of the trial.

The correction now asked in behalf of the State, may—hereafter—be asked in the name of a convicted prisoner, as a protection to a real and imperiled right, to reinstate the omitted elements of a legitimate

State ex rel. Ogden, Attorney General, vs. Judge Sixth Judicial District.

defence; and—in the interest of sentenced convicts, the State and justice, such corrections should be allowed; but—as already said—on legal, sufficient and incontrovertible evidence that the alleged errors and omissions have occurred.

As—in this case—no evidence was offered to sustain the district attorney's application, the rule issued by this court on the 6th of December 1878, is discharged at the costs of relator.

ON REHEARING.

When we said—in the opinion delivered on the 30th of December—that the rule filed by the district attorney was not before us, we meant—and it was a fact—that it did not accompany the transcript, and not—as erroneously supposed by the assistant prosecutor—that we could not have properly considered the same in passing upon the application evidenced by that rule. We looked for it after the submission of the case, but—when we did—it was not in the office of the clerk of this court, and this induced the remark made in the opinion, that the only documents placed before us were the relator's application for a mandamus and the judge's answer to the application.

To the rule taken by the district attorney is attached a copy of the judge's decision, and these two documents, which we saw and read for the first time, only after we had rendered our previous decree, and since the filing of the assistant prosecutor's application for a rehearing, conclusively show that the rule to correct the minutes was discharged—not, as we inferred from the judge's answer, "because no testimony was offered or brought before him, in his official capacity, either by affidavit taken *ex parte*, or in any other manner," but for another, a different reason, and that is—in the words of the exception which he sustained—that, as to the matters embraced in the rule, his court is absolutely without jurisdiction.

We have said, and our opinion has not changed—that the judge has, and that he should exercise the power to correct the erroneous entries made, or supply those which are shown to have been improperly or inadvertently omitted on the minutes of the court over which he presides. This, it is his duty to do, on application of the officer representing the State, the prisoner's counsel, or any litigant, after due notice to the interested parties, and—in criminal cases—in presence of the accused or convict. In so doing, a judge does not alter, he perfects or completes the defective or incomplete record of the trial—he does not resume jurisdiction of any branch of the cause which has passed beyond the limits of his jurisdiction, he merely takes an authorized step to transmit to this court a true and correct record.

State ex rel. Ogden, Attorney General, vs. Judge Sixth Judicial District.

20 A. 580, 581, 582—High's Extraordinary Legal Remedies, p. 186, No. 245. H. D.—old ed. p. 73, No. 8.

In this instance, the writ of *certiorari* would have been inadequate, and believing—as we do—that the judge had jurisdiction, and should have entertained the district attorney's application,

It is ordered that our former decree is set aside, the mandamus issued by this court on the 6th of December 1878 made peremptory, and that the judge of the Sixth District of the State take cognizance of, fix for trial, hear and determine the rule filed in his court, by the district attorney of said district, in the case entitled "State of Louisiana vs. George Carroll et als.," and that he pay the costs of this proceeding.

No. 7279.

CITY OF NEW ORLEANS VS. THE SOUTHERN BANK.

The Southern Bank can not be held liable by the city of New Orleans for using the city bonds (issued under act of the 27th of February, 1868, and deposited with the bank as Fiscal Agent of the city) to liquidate, and fund at par such debts of the city as were embraced in the statement prepared by the Comptroller and Treasurer of the city, verified by the Mayor, and members of the Finance Committees, of the Board of Aldermen and Assistant Aldermen, and placed in the hand of the Fiscal Agent for its guidance. The Bank had no power to go behind that statement, and refuse to fund any debt embraced therein.

Where a municipal corporation approves, and ratifies the illegal, and unauthorized action of its agent, and afterwards, when sued by a third person, pleads such action and its results as a ground of defence, it is thereby estopped from subsequently pursuing the agent on account of such action.

A claim for damages, founding in an offence, or quasi-offence, committed by a private individual, or by a public ministerial officer, is barred by the prescription of one year.

A PPEAL from the Fifth District Court, parish of Orleans. *Rogers, J.* Trial by jury.

Henry C. Miller and *Sam. P. Blanc*, Assistant City Attorney, for plaintiff and appellee.

Edward Bermudez and *A. & W. Voorhies* for defendants and appellants.

The opinion of the court was delivered by

MANNING, C. J. The City of New Orleans sues the Southern Bank, and Thomas Layton, and Antoine Dubuclet *in solido* for eight hundred and five thousand dollars of City Bonds, with all the attached coupons for twenty five years representing seven per centum per annum interest from March 1, 1869; or in case that the Bonds and coupons cannot be returned, that the defendants be condemned *in solido* to pay the princi-

pal, with seven per centum interest annually from the above date for twenty five years. The case was tried by a special jury.

A verdict having been rendered for eighty four thousand three hundred and twenty three dollars and eighty four cents against the Bank and A. Dubuclet *in solido*, and of one hundred and fifty dollars against Thomas Layton, judgment was rendered accordingly, and the Bank and Dubuclet have appealed.

The cause of action was this ;—that by Act of the General Assembly, approved February 27, 1869, the City of New Orleans was empowered to issue bonds to the amount of two millions of dollars, payable twenty five years after date, and bearing seven per centum per annum interest, to enable it to fund and liquidate the balance of its floating debt, existing at that date, such as judgments, outstanding warrants, etc., which bonds, when issued, were to be deposited with the Fiscal Agent, exclusively in payment at par of debts then due by said City, other than those evidenced by City notes; a full and particular statement of which debts should be prepared by the Comptroller and Treasurer of the City, verified by the Mayor and the members of the Finance committees of the Boards of Aldermen and assistant Aldermen; which statement, so verified and attested, should be furnished to the Fiscal Agent; and “it shall be the duty of the Fiscal Agent to give said bonds at par in payment of the debts of the City to the creditors mentioned in said statement, or to their heirs or assigns”—that the Southern Bank was before, and at, that date the Fiscal Agent of New Orleans, and continued to be until during October, 1869, and the bonds thus provided for were issued and deposited with that Bank, and that eight hundred and five thousand dollars of them have been illegally and wrongfully retained, disposed of, or paid out by the Bank and others in this way;—

Under the Act, approved September 14, 1868, the Board of Commissioners of the Metropolitan Police apportioned and assessed against the City of New Orleans for the year ending October 1, 1869, the sum of eight hundred and five thousand six hundred and thirty five dollars, to be raised by taxation, and to be paid to the State Treasurer for that Police, and the provisions of that Act were reenacted on March 8, 1869. In July 1869, the Common Council of New Orleans adopted an ordinance authorizing the proper officers to issue eight hundred and five thousand dollars of the two million of bonds, to be disposed of under such rules as the Finance Committees and the Mayor might establish, provided the bonds so issued be given by the Fiscal Agent at par in payment to such creditors of the City as should be determined by those Committees and the Mayor were within the purview of the Act. On July 15, 1869 these Finance Committees, contrary to the requirements of the Act of February 27, 1869, determined to use a portion of the bonds deposited

with the Fiscal Agent to pay the Metropolitan Police apportionment, and accordingly resolved that the Fiscal Agent should pay to the State Treasurer the bonds referred to in the Ordinance of July, for the purpose of paying that apportionment, with the same proviso that was contained in the Ordinance, viz that such payment of these bonds to the State Treasurer be made at par, and no discount should be allowed on them, and with the further proviso that the receipt of the Treasurer shall stipulate that no discount on the bonds is to be made, and that none of them shall be paid to the Treasurer until he shall have been legally authorized to receive them, by resolution of the Metropolitan Police Board, in full payment of all claims it might have against the City.

This resolution was communicated to the Metropolitan Police Board, and to the Fiscal Agent, on July 16, 1869, and the Board refused to recognise the legality of the action of the Finance Committees, and refused to receive the bonds.

It is then alleged that the Fiscal Agent, despite this refusal of the Board, and contrary to the resolutions of the Finance Committees, arranged with Dubuclet, the State Treasurer, to take these bonds to New York and sell them—the Fiscal Agent making a paper transfer of the bonds to the Treasurer on July 20, 1869, and taking his receipt therefor, which receipt, it is alleged, did not conform to the requirements and provisos of the Finance Committees; and immediately thereafter the bonds were taken by Thomas Layton to New York, with Dubuclet's knowledge and consent, and were sold at a discount of twenty one and one half per centum. Mr. Layton was the President of the Southern Bank.

That with the proceeds of the sale of these bonds, Dubuclet undertook the purchase of Metropolitan Police warrants, and finally about five hundred and thirty seven thousand nine hundred and forty dollars and twenty eight cents in those warrants were paid out of those proceeds.

The plaintiff charges that the Southern Bank, as Fiscal Agent, was specially entrusted with the custody of the City Bonds, and the duty was imposed upon it of not paying them out, except for debts of the City that existed on February 27, 1869, and only for such of those as should appear in a statement of the City Comptroller and Treasurer, verified by the Mayor and the Finance Committees, and that not even for the payment of debts so stated and verified should the bonds be discounted—that in violation of its trust, the Fiscal Agent paid or gave out these bonds without having the statement required, and at a loss by discount of twenty one and a half cents on the dollar, and for claims which were not, and were not pretended to be, debts of the City of the

class specified, the Ordinance of July not authorizing these bonds to be given in payment of the Metropolitan Police apportionment, and the Finance Committees having no power or authority to make such destination of them—that even if these bonds could have been issued to pay that apportionment, not more than \$537,940.28 of Metropolitan Police warrants were actually retired by the bonds, leaving the residue, viz \$276,694.72 of bonds of the City outstanding, with all their coupons, for which the City has not received any consideration whatever.

The Bank, after filing exceptions which we think untenable, pleaded a general denial, and admitted that it had received as Fiscal Agent the bonds as charged, and averred that it was its duty by law to apply them according to the statement, prepared and verified by the City officers mentioned in the law, and that it did so apply them—that this statement was furnished by those officers to it, and that it purports to be a statement of the indebtedness of the City, as required by the Act of February 27 1869, and includes among that indebtedness the apportionment for the Metropolitan Police—that in addition to this statutory direction for the application of the bonds, the Ordinance of the City Council reiterated the same direction, and in obedience to both of these mandates, the Fiscal Agent gave to Dubuclet, the Treasurer of the State, the bonds in question at par and in full payment of the Metropolitan Police apportionment—that after the Bank had ceased to be the Fiscal Agent, it rendered its account to the City, shewing the disposition of the bonds made by it, which account was approved, and the residue of the two millions of bonds were delivered to its successor, and that the City has recognised its liability for the \$805,000.00 of bonds by funding all or a part of them under the law, known as the Premium Bond Plan. The Bank, then premising that the subsequent disposition of these bonds is none of its concern, informs the court and alleges that they have been disposed of, and did realize \$537,940.28, which was applied to the retirement of the Metropolitan Police warrants, and prays judgment against the City for this sum. The Bank, in addition to all this, avers that after these bonds had been thus applied, the Metropolitan Police Board brought suit against the plaintiff to compel her to pay over to the Board the amount of the estimate and apportionment for that Police, and the City set up in defence to that action, under the oath of her chief executive officer, that payment of that apportionment had been made by the delivery by her Fiscal Agent to the State Treasurer of \$805,000.00 of these seven per cent. bonds, and that such delivery was a full payment and discharge of any and all liability on her part for and on account of such apportionment.

There can be no doubt that, under the law of February 1869, the City Comptroller and Treasurer should not have included the Metro-

litan police apportionment in the estimate they were required to make of the floating debt of the City, and the Mayor and Finance Committees should not have verified such statement. But they did it. All the officers of the City, whose statement or verification was required by the Act of the legislature, joined in signing the papers, prescribed with so much particularity. The General Assembly doubtless thought that the requirement of a concurrence of so many officers in preparing the statement of the City's indebtedness, and of the concurrence of an additional number of different officers in verifying it, was such a safeguard as would under all circumstances protect the City against either wrong doing, or a misconception of the duty to be performed. The Act expressly makes it the duty of the Fiscal Agent to give out the bonds at par in payment of the debts of the City "to the creditors mentioned in said statement," and it cannot have been contemplated that the Fiscal Agent should have the right—much less, that it should be its duty—to go behind a statement, the correctness of which was supposed to be insured by requiring it to pass under the inspection of such a crowd of officers, and to receive the signature of each of them.

These officers had included the Police apportionment in their statement and verification in spite of the prohibition of the Statute, under which they were acting, and in wilfull contempt of its peremptory mandate. Their act was wilfull, because it is apparent from their careful observance of other details in the law of February 1869, that they knew its requirements, and were studiously consulting it in order to comply with its directory provisions as to the officers who should make the statement, and those who should verify it, and they complied with these, and with the command that the bonds should be given out only at par, by inserting that proviso in the Ordinance of July 1869. They intended to comply with those requirements which gave form and appearance to the authorization for paying out the bonds, the more surely to accomplish the illegal purpose of having them paid out for a huge estimate of Police expenses, which was not a part of the then existing floating debt of the City.

The Bank avers that under that verified statement of the City officers, it had no option but to pay bonds for the Police apportionment, and that it complied with the legal mandate to pay them out at par, and triumphantly points to the receipt of the State Treasurer, acknowledging the delivery of the bonds at par.

This last averment is not sustained by the record. The bonds were never delivered to the Treasurer. That officer pretended to have received them, and signed a paper on July 20, 1869, formally acknowledging to have received them from the Fiscal Agent in full payment of the statement of the Police assessment, whereas in truth the bonds were never

in his possession. Worse still, the bonds were not then in the possession of the Fiscal Agent. The formal receipt of A. Dubuclet, signed as State Treasurer, professing to have received from the Southern Bank this large amount of bonds, which the one did not have and the other therefore could not take, was but a bunglingly performed feat of legerdemain, wherein an object not in one place is made to appear to pass from it into another place, to the great delight of the audience of City officers who witnessed, and with ready complaisance applauded this ill-concealed trick of sleight of hand.

While the object and nature of this paper transfer is abundantly shewn, and indicates great carelessness on the part of the Fiscal Agent, the record fails to establish its *mala fides*. Holding then that it could not refuse to give out the bonds upon the verified statement of the City officers, this mode of putting them under the control of the State Treasurer, although reprehensible, is not fatal to its defence. And this the more, since we find that after it had ceased to be the Fiscal Agent of the City, it rendered an account of its gestion to the plaintiff, (which necessarily included the whole transaction relative to the giving out of these bonds) and that the plaintiff approved and ratified the defendant's act. Such ratification was clearly within the City's power to make, since she had the power, through certain designated officers, to order the doing of the act which was subsequently ratified. We lay no stress on the fact that a recognition of these Bonds was made by providing for funding them in Premium Bonds. The bonds were out, and the City was assumed to be liable for them. That liability constitutes the ground for this suit to recover their amount from those who are charged with unlawfully putting them out. And besides, after the plaintiff knew of, and had ratified the manner of putting her bonds out, even assuming that her Fiscal Agent had misapplied them, and when she in turn was sued by the Police Board, in order to relieve herself of liability for the apportionment of \$805,635.00, she pleaded in defence that she had paid it by her Bonds for a fraction less than that sum, and that she was forever acquitted and discharged of the debt. It is a judicial declaration that binds her.

The plaintiff's counsel seeks to draw a distinction between the City government then and now, and would have us disregard and ignore the acts and declarations of its officers at the period when these things were done. We cannot assume that those acts were not her will then. She speaks and acts only through her accredited servants, and if she has had bad servants, she suffers from their maladministration as an individual often suffers from the unfaithfulness of his agents; and as an individual would be bound by his ratification of a wrongful act of his agent, for which responsibility did not attach when it was done, so a

corporation must in like manner be bound by its ratification. The plaintiff condoned the malfeasance, if there were any—adopted the acts of her Fiscal Agent and made them her own, and screened herself from an alleged liability to a party professing to have been injured, by pleading those acts as a virtuous discharge of her obligation. She is estopped from recovering of the Bank now.

The defence of Dubuclet is of a wholly different kind. He was the Treasurer of the State, and his acts relating to this matter were official.

The Metropolitan Police Act put in motion machinery, ingeniously contrived to strangle local corporate government. It substituted centralized autocratic domination to the exercise of corporate powers for local regulation. The parishes of Orleans, Jefferson, and St. Bernard, were territorially united for the purposes of police government and police discipline into one district, and the powers and duties connected with, and incident to that government and discipline, were vested in a board of commissioners, who were to be appointed by the Governor of the State, and who were to appoint one of themselves to be treasurer of the Police District thus formed, which treasurer was to receive from the State Treasurer the moneys belonging to the Police Fund. Sess. Acts 1868, p. 85. Thus the Treasurer of the State was brought in connection with this organization.

The defence of Dubuclet is, that the cause of action set forth in the plaintiff's petition arises *ex delicto*, and is barred by the prescription of one year.

There is no pretence that the action is founded on any contract between the State Treasurer and the City, nor can there be, that it is founded on a quasi-contract. This latter is the lawful and purely voluntary act of one from which there results any obligation whatever to a third person. . Civil Code, art. 2272 new no. 2293.

Pothier defines an offence to be *un fait par lequel une personne, par vol ou malignité, cause du dommage ou quelque tort a une autre*, and a quasi-offence to be *le fait par lequel une personne, sans malignité mais par une imprudence qui n'est pas excusable, cause quelque tort a une autre*. The characteristic therefore of offence or quasi-offence is that the act, from which the obligation arises, is unlawful. The marked distinction then between a quasi-contract, and an offence or quasi-offence is, that the act which gives rise to a quasi-contract is a lawful act and therefore is permitted; while the act which gives rise to an offence or quasi-offence is unlawful, and therefore is forbidden. The Pandects clearly draw the line of distinction between contracts and delicts;—*Ex maleficio nascuntur obligationes, veluti ex furto, ex damno, ex rapina, ex injuria, quæ omnia unius generis sunt; nam hac re tantum consistunt, id*

est ipso maleficio, quum alioquin ex contractu obligationes non tantum re consistunt, sed etiam verbis et consensu. Dig. L. 44 Tit. 7 sec. 4.

The distinction between damages *ex delicto* and *ex contractu* is, that the latter ensue from the breach of a special obligation, and the former from the violation of a general duty. Marcadé says:—Remarquons bien que c'est de la violation d'un devoir proprement dit qu'il s'agit, d'un de ces devoirs généraux existant au profit de toutes personnes, et non pas de la violation du devoir existant spécialement de telle personne déterminée à telle autre déterminée, et qui constitue l'obligation. *Explic. du Code Napoleon* art. 1382.

Applying this test to the plaintiff's petition, it is apparent that the alleged responsibility of the State Treasurer is for an offence or quasi-offence, and that the damages resulting therefrom are necessarily *ex delicto*, and the action therefor is prescribed in one year. Civil Code, art. 3501 new no. 3536. It must be observed that Dubuclet was to receive only money—to be raised by taxation, says the Act—and he did not receive money, but bonds, and his act was therefore unlawful, and is an offence or quasi-offence.

And the rule applies to ministerial officers as well as to individuals. This court said in *Semple v. Buhler*, 6 Mart. N. S. 665;—the law makes no distinction in this respect between public ministerial officers and private individuals, and we ought not to distinguish, and were we at liberty to do so, it would be difficult to find any good reason for imposing a heavier responsibility on a public than a private agent. And this was reiterated in *Edwards v. Turner*, 6 Rob. 382, *Emmerling v. Graham*, 14 Annual, 389, *Taylor v. Graham*, 15 Annual, 418.

It is ordered, adjudged, and decreed that the verdict of the jury is set aside, the judgment of the lower court is avoided and reversed as to these two defendants, and that there be now judgment in favor of the Southern Bank against the plaintiff upon the demand set up herein, and that there be judgment in favor of A. Dubuclet sustaining his plea of prescription, and that these defendants recover of the plaintiff the costs of appeal.

ON APPLICATION FOR REHEARING.

MANNING, C. J. This case was decided at the New Orleans Term in May, and an application for rehearing having been made, and time granted to July 7th for printed argument thereon, and the case having been brought here (Opelousas) by consent for the purpose of considering and determining that application,

It is ordered that the rehearing of this case is refused.

Burthe, Tutrix, vs. Denis, Executor.

No. 7451.

MRS. GEORGE BURTHE, TUTRIX, VS. ARTHUR DENIS, EXECUTOR.

Where the intention of the testator, as to the quantity of interest devised to different legatees, can be ascertained with reasonable certainty by the terms made use of by the testator in his will, those terms will be relied on for determining what the intention was. But if those terms leave the testator's intention doubtful, extrinsic evidence may be admitted to explain and interpret the intention. And in case of any remaining doubt as to the quantum of interest disposed of, that interpretation will be adopted which approximates closest to the order of distribution fixed by law.

A PPEAL from the Second District Court, parish of Orleans. *Tissot, J.*

Edward Bermudez for plaintiff and appellant.

Henry Denis, Henry Chiapella, and Thos. J. Semmes for defendant and appellee.

The opinion of the court was delivered by

SPENCER, J. Mrs. Felicie Burthe, widow of Louis Frederick Foucher, Marquis de Circè, died in France, November 22, 1877, without forced heirs, leaving an olographic will.

Her father had five children, to wit: herself and four brothers, Edmond, Henry, Leonce A., and Victor. These four brothers died before her, leaving children as follows:

Edmond, one child; Henry, two children; Leonce, four children; Victor, four children.

George Burthe, one of the children of Victor, died also before the testatrix, leaving six minor children who, through their mother as tutrix, are the plaintiffs in this cause.

Another of the sons of Victor, to wit, Emmanuel, died before the testatrix, leaving two children.

The contest before us grows out of the interpretation of the following clause in the will of Mrs. Foucher, Marquis de Circè:

"P'institue pour mes legataires universels conjointement les enfants de mes quatre freres decédés, et à leur défaut leur descendants, par portion égale dans chaque branche."

"I institute for my universal legatees, conjointly, the children of my four deceased brothers, and in their default their descendants, by equal portion in each branch."

As we have seen, these four deceased brothers left among them eleven children, two of whom were dead before the testatrix.

The plaintiffs contend that the estate must be divided in eleven equal portions corresponding to the number of the four deceased brothers' children—that these eleven children were the legatees to whom was given, conjointly, the estate of the testatrix. That in default of any of

these legatees, then to their descendants "by equal portion in each branch." The defendants contend that the estate must be divided into four equal parts, corresponding to the four deceased brothers, and that one part, or one fourth, of the estate must go to the children or descendants of the brother Edmond, one part or fourth to those of the brother Henry, one part or fourth to those of the brother Leonce, and one part or fourth to those of the brother Victor. So that as Victor left four children, each of them would receive only one sixteenth, and as George, the father of plaintiffs, was one of Victor's four children, plaintiffs, as representing George, are entitled to 1-16 instead of 1-11, as claimed by them. The estate exceeds half a million of dollars in amount.

It will be seen that under the theory of defendants, the will did not alter the legal order of descent, but distributed the estate just as the law would have done.

There are some elementary rules for the interpretation of wills which should be kept in mind, of which the following are pertinent to this case :

First—It is *the intention* of the testator which should be sought, and this should be deduced primarily, if possible, from the will itself, without resort to extrinsic circumstances.

Second—"If, from the terms made use of by the testator, his intention can not be ascertained, recourse must be had to all circumstances which may aid in the discovery of his intention." R. C. C. 1715.

This right of resorting to extrinsic evidence, is not limited to cases of "ambiguity or obscurity in the description of the legatee," for that is provided for in R. C. C. 1714; nor to the ascertainment of "what the thing was, which the testator intended to bequeath," for that is provided for by art. 1716 R. C. C. We see no reason to doubt that the rule of art. 1715 would extend to the case where there was ambiguity or obscurity, as to the *quantum* or *portion* of a legatee, as well as to the case where there is doubt as to sense in which words are used by the testator. The article is general and absolute, and makes no distinction between *latent* and *patent* ambiguities; but authorizes the court to resort "to all circumstances" which may throw light upon the matter, "*when from the terms used by the testator his intention can not be ascertained.*"

Such seems, also, to be the rule at common law, where much greater strictness has prevailed on this subject. Wigram on Wills, proposition V, p. 155, thus states the rule :

"For the purpose of determining the object of a testator's bounty, or the subject of disposition, *or the quantity of interest intended to be given by his will*, a court may inquire into every material fact relating to the person who claims to be interested under the will, and to the property which is claimed as the subject of disposition, and to the cir-

cumstances of the testator and of his family and affairs, for the purpose of enabling the court to identify the person or thing intended by the testator, or to determine the quantity of interest he has given by his will."

"The legitimate effect of circumstantial evidence, in cases in which the *quantity of interest* given by the will is the point in dispute, is not perhaps so well defined as in the cases which have already been stated. The proposition, however, that such evidence is admissible where the quantity of interest is the point in dispute, is certain."

"This proves in the clearest manner the right of a court of law, where the *estate or quantity of interest* disposed of by a testator is in dispute, to look out of the will and be guided in the construction of it by the effect (if any) which the circumstances of the case may have upon it."

Third—Another important rule is, that in case of doubt, that interpretation should be preferred which will approximate closest to the legal order of distribution. This rule flows from the general principle that the law favors the distribution which it itself provides, and gives effect to the will of man only when that will is clearly expressed or fairly deducible.

In *Lyon vs. Acker*, 33 Connect. p. 229, the court says: "It is a sound rule when a devise or legacy is given to heirs or their representatives for courts to apply the general principles governing the descent of estates, unless a contrary intention appears. The statute of distribution governs in all cases where there is no will; and where there is one, and the testator's intention is in doubt, the statute is a safe guide."

In *Menton's appeal*, 4 Wright Pa. 111, the court says: "When we find a man distributing his estate in whole or in part among his next of kin, and he leaves the proportions in which they are to take in doubt, it is quite natural for us to suppose that he had that statutory or customary form of distribution in his mind, and to interpret his will accordingly."

In *Clarke vs. Lynch*, 46 Barbour 73, the court says: "In construing wills, the courts take notice of the natural relations in which the testator stands to the objects of his bounty, and the mode in which the law would dispose of the estate in case he had died without indicating his purposes; and thus they will interpret the will by these considerations and legal dispositions, unless such interpretation should be overcome by extrinsic facts clearly existing and obvious to the mind of the testator, or by the explicit and unmistakable terms of the will."

In *Flissel's appeal*, 3 Casey 27, Pa. State 55, the court says: "In construing such devises we can not reject the legal and customary principles governing the descent of estates; and, according to them,

distribution goes by classes. And this must be presumed to be the intention of testators generally, unless the contrary appear, for all are supposed to assent to the general justice of the law on this subject. This is only another form of the rule that in doubtful cases the claim of the heir shall have preference."

"Quia in dubiis testator videtur se conformare cum legis dispositione et ad eam se referre."

Our first and primary duty therefore is to ascertain whether "from the terms made use of by the testatrix," her intention, as to the mode of distribution, and the quantum of interest, can be ascertained with reasonable certainty. The real difficulty is to determine to what does the words "each branch" refer and qualify? Do they refer to the "children" or to the "four brothers?" In other words, is each child a "branch," or is each brother? It depends upon the standpoint taken, and from which the question is viewed. Thus, viewed from the standpoint of the common ancestor, Dominique Burthe, each brother would be, in legal parlance, a "branch," while in respect to their descendants, each of these brothers would be a "root." So that, admitting, as contended by plaintiff's counsel, that the term "branch" has a fixed legal signification not to be disregarded, the doubt still remains, and is not relieved, as to whether the testatrix had in her mind and viewed the kinsmen from the one or the other standpoint. If she intended to speak of her brothers as branches of her father's family, then defendant's interpretation must prevail. If she intended to speak of the children as branches of her brother's families, then plaintiff's views are correct. Grammatical rules will perhaps admit of either construction being given. We incline to think that the fact that the testatrix has specified *the number of her brothers*, instead of the number of *their children*, indicates that it was her intention to make that number the dominant factor in the distribution. This conclusion finds support in the third rule above stated, and is more conformed to the legal order of distribution than would be the plaintiff's theory.

The judge *a quo* held that there was doubt and ambiguity in the disposition, and he admitted extrinsic evidence to assist in ascertaining the intentions of the testatrix. We are not prepared to say that he erred. Both interpretations, that of plaintiff's and that of defendant's, when deduced from and predicated upon *the terms of the will alone*, are to say the least questionable and doubtful, arising from ambiguous expressions in the will.

If we resort to this extrinsic evidence, there no longer remains a doubt as to the correctness of defendant's construction.

That evidence consists largely of the writings of the testatrix, proven to be genuine. She, during her life, and not many years before her

Burthe, Tutrix, vs. Denis, Executor.

death, divided out among these "children of her four deceased brothers," a large amount of funds, proceeding from the sales of property in New Orleans. Writing to one of these nephews (her agent) she says: "Mon intention est de vous partager ma portion de l'heritage de mes parents, qui ne m'est plus necessaire, et cela des aujourd'hui, et non au jour de ma mort, ce qui ne pourrait pas vous manquer. A partir de ce moment done, je vous abandonne a vous, mes neveux, les fils de mes quatre chers freres qui n'existent plus, toute ma part dans la succession de mon pere et de ma mere; ainsi $\frac{1}{4}$ pour la branche de Leonce; $\frac{1}{4}$ pour la branche de Victor; $\frac{1}{4}$ pour toi qui representes seul la branche d'Edmond, et $\frac{1}{4}$ pour la branche d'Henry. Ceci est bien pose."

We have here her distinct avowal that she is doing this as a sort of advance upon what *could not fail them* when she was dead. We also see that the "branches" she had in her mind were her four brothers. Other letters on this subject refer to her brothers as the *branches*. She speaks of "the branch" in which there are "four members," etc.—"two members," etc.

Finally, a paper, proven to be in her own handwriting, was found among her effects, and is produced, in which she explains the dispositions of her will, and from which it is clear that she intended to give the family of each of her four brothers one fourth of her estate.

The judgment below so decreed. It is correct, and is affirmed with costs.

No. 7530.

AUGUSTA A. BUDDECKE VS. C. T. BUDDECKE ET AL.

Where a sale of property, in which minors are interested, is made under an order of court in order to effect a partition, it is not necessary that the full appraisal of the property should be bid.

In a suit for the partition of property of which minors, who are absentees, are coproprietors, each of the minors is properly represented in the suit by a *curator ad hoc*.

The court of ordinary jurisdiction, and not the probate court, has jurisdiction of a suit for the partition of property which belongs in part to the major and minor heirs of a deceased wife, and in part to the surviving husband. It is only when the property belongs wholly to a succession, under administration, that the probate court has jurisdiction of a suit for its partition.

A PPEAL from the Fifth District Court, parish of Orleans. *Rogers, J.*

Henry C. Miller for plaintiff and appellee.

J. McConnell and *Horace E. Upton* for defendants and appellants.

The opinion of the court was delivered by

MANNING, C. J. The community existing between Christian T. Buddecke and his wife was dissolved in 1876 by the death of the latter.

There were eleven children, three of whom are minors. Mrs. Buddecke left a will, which was probated by the Second District Court of Orleans in March 1877, by which she bequeathed all her interest in the community property to her children, subject to her husband's right of usufruct, changing the disposition of the law only in this, that she gave the disposable portion to some of the children to the exclusion of others. On April 3, 1877, the husband having applied to the court to be put in possession, as usufructuary, of the property, an order or judgment to that effect was made, and he went into possession thereof.

The property was real estate in New Orleans. Its partition was desired. No inventory of it had been taken in the mortuary proceedings of Mrs. Buddecke, and no account filed. There was nothing to file an account of, and therefore none was needed. Augusta, one of the major proprietors, instituted this suit in the Fifth court of Orleans for a partition of the property held in common between her and the defendants, who are her father and brothers and sisters, and it was ordered. The minors live in Virginia with their father, upon whose affidavit to that effect, curators *ad hoc* were appointed. A special curator *ad hoc* was appointed to each of the three minors. An inventory was taken of the property, under order of the Fifth court in this case, under the allegation that none had been taken within a year, and it was appraised at eleven thousand dollars, and sold for eight thousand dollars. John Calder bought it, and refused to comply with his bid. The terms were one fourth cash, and the residue in three equal annual instalments, and had been fixed as to the minors' shares by a family meeting, and the major owners agreed to the same terms for their shares. A rule was taken on him to shew cause why he should not be compelled to comply with his bid, and he has answered. This answer presents the issues now to be decided.

They are 1. That the Fifth court had no jurisdiction to decree a sale for partition of this property, the same being succession property in which minors are interested; 2. that the property belongs to the succession of Mrs. Buddecke to the extent of one undivided half thereof, which succession has been opened in the Second court, and has never been settled and closed; 3. that the minors have been improperly, and illegally represented therein; 4. there was no legal appraisalment; 5. there has been no valid sale, the price bid being less than the appraisalment; 6. *lis pendens*, in that an action for partition had been instituted in the Second court, and was pending.

The suit in the Second court had been discontinued, and the last plea therefore falls.

Whether the succession of Mrs. Buddecke was closed or not is of no consequence, and therefore we express no opinion about it, for as-

Buddecke vs. Buddecke et al.

suming that it was still open, this suit is not a proceeding in it, nor for its partition, since the succession owned but one half of the property, and the partition is sought of the whole of it.

The appraisalment was made under order of court in the proceedings for partition, Civil Code, arts. 1247—8 new nos. 1324—5, and in a licitation made at the instance of co-proprietors of minors the full appraisalment of property need not be bid, as the rule touching that requirement in the alienation of minors' property does not apply. *Shaffet v. Jackson*, 14 Annual, 154. Civil Code art. 339 new no. 345.

The minors, being absentees, were properly represented by curators *ad hoc*, and this was expressly declared to be the proper course in actions of partition of successions, *M'Cullough v. Minor*, 2 Annual, 466, and is the proposition disputed by the respondent. It has been later held, when a mortgage was to be enforced, the mortgagor being dead, and the exception was made that the heirs, some of whom were minors, had not accepted the succession and the widow had not renounced, a curator *ad hoc* was rightfully appointed. *Randolph v. Chapman*, 21 Annual, 486. It is apparent the minor was not an absentee in *Malone v. Casey*, 25 Annual, 466.

The last five grounds of the objection of the respondent in the rule are therefore untenable. The first and only remaining objection will be considered by itself.

In *Boutté's* case, 30 Annual, 177, we held the Second court was without jurisdiction of that partition suit, because the property to be divided was owned by two separate and distinct successions, each claiming ownership of its part, not by title derived from a common ancestor, but from two different sources. We are surprised to learn that decision upset opinions of some of the Profession on the matter of jurisdiction, upon which their practice had been based. That decision but followed the old and beaten path. Forty years ago, the same rule was explicitly laid down by this court in a case, which has been 'reported' in the legal sense of that word, and from the Reporter's statement of the facts, and the epitome of the points raised on either side, we know its whole history. *Henry v. Keays*, 12 Louisiana, 214.

The plaintiff's counsel there raised the identical question that is raised by the respondent here, and cited the same paragraph of the article of the Code of Practice to support it that is cited here. The defendant's counsel there opposed the same reasons and the same authorities upon which the plaintiff in this case relies. The difference between the cases is that the present is much stronger than that, and if the rule regulating jurisdiction was rightly applied in that case, there is much greater reason to justify its application in this. The court go direct to the mark, and in language, at once perspicuous and succinct,

announce without qualification ;—"The authority of the district court to ordain and regulate a partition of property, held in common by other title than hereditary succession, at the suit of a co-proprietor, can hardly be questioned at this time. It is the ordinary action *de commune dividendo*." This is said where the case was the brothers and sister claiming partition of the property of a deceased sister, but one of them claimed under a donation, and the court said ;—"Admitting in ordinary cases that, where *the thing to be partitioned is one entire succession and the parties hold by the same title as heirs*, the authority of the court of Probates is conclusive, yet in the case now before the court, such is not alleged to be the fact. As to the fourth claimed by the plaintiff under the donation, although she is a joint owner with the defendants, *she does not claim as heir of the deceased*, but in virtue of the donation." Ibid. 219.

The respondent rests his case upon the Code of Practice, and the decisions of this court cited by him, every one of which we shall review.

Courts of probate have the exclusive power to obtain and regulate all *partitions of successions* in which minors or absent persons are interested, or even those which are made by authority of law between persons of lawful age and residing in the State, when such persons cannot agree upon the partition and mode of making it. Code Prac. art. 924.

All *partitions of succession property* shall be made by the court of probate of the place where the succession is opened. Ibid. art. 1022.

The heir, desirous of obtaining a partition, shall present his petition to the judge of probates, praying that *his co-heirs* may be cited, etc. Ibid. art. 1024.

But what is to be done if it is not a succession that is to be partitioned, nor property belonging to one, and where therefore the person to be cited is not a co-heir? Is Christian Buddecke heir of his wife? Has he any part or lot in her succession? Is the thing to be divided her succession? He owns one half of the thing to be divided—not by inheritance from her or from any one, but by a distinct, separate, and independent title. A partition of a succession is not asked here. If it be, why is Mr. Buddecke cited? He owns no part of his wife's succession. He is not a co-heir with his children. What need of making him a party to a suit in which he can have no possible interest? For if we accept the theory that the thing to be divided is a *succession*, he is an outsider as to that, and should not be a party to the suit. Now here is the crucial test. If he were not made a party, the proceedings would be defective. Why? Because he is one of the owners. Being owner in his own right, and not as heir or by other title derived from the succession, is it not incontrovertible that the thing owned is not a succession?

But we are told there is another feature in these Articles. Partitions of successions in which minors or absent persons are interested must be made by the Second court. Most true. But must the Second court make partition of property, in which minors or absent persons are interested, that is not a succession, and does not belong to a succession? It is apparent above that this property is not a succession. Is it not equally so that it does not belong to a succession? Mr. Buddecke bought it while Mrs. Buddecke was alive. If he had not, she would never have owned any part of it. He bought it then before any succession was opened—before there was any succession—and he holds by the same title now that he did then. Is not what he owns a part of the thing to be divided?

What countenance does the respondent's objections receive from adjudicated cases? There is not a case since *Henry v. Keays* that impinges the rule there laid down, much less overrules it. He cites *Walker v. Kimbrough*, 23 Annual, 637. It cannot be supposed that, in the isolated expression—"the parish court had jurisdiction to partition property of the community"—disconnected as it is, it was meant that the partition of community of all spouses, one being dead, is exclusively within the jurisdiction of the parish court, and unless it means that, it is not in conflict with our ruling. *Moreau's case*, 25 Annual, 214, was an action by one heir against his co-heirs to recover his interest in the succession of their mother—the mother of all of them. Held, that he must first provoke a settlement of the succession, and then sue for a partition—very good doctrine, but in what particular applicable here is not apparent. The Buddeckes were not co-heirs—the father had no interest in the mother's succession. No settlement of that affected or interested him.

The *pièce de résistance* of the respondent's first of authorities is *Malone v. Casey*, 25 Annual, 466, which the brief informs us "fully maintains the position assumed by appellant." The plaintiff, claiming to be an heir of Mary Casey deceased, instituted in the parish court an action against her co-heirs for partition of the decedent's estate. The defendants excepted to the jurisdiction. The court say;—"So far as we can learn from a rather scant record, it would appear that the proceedings in this case have been irregular. The succession can only be accepted on behalf of the minor with benefit of inventory, and it appears he is without a tutor. The succession is without a representative, and the minor's interest therein is not ascertained. Under this state of facts, we deem it best to remand the case for further proceedings. It is therefore ordered," etc. That is all, and nothing more.

The last case cited is *Woolfolk's*, 30 Annual, 139 where we held that when the succession no longer existed, the parish or probate court had

 Buddecke vs. Buddecke et al.

not jurisdiction of the partition, a doctrine we propose to apply in this case, and which we have recently affirmed in *Freret's* case, not yet reported.

We have thus been at pains to justify a ruling made by us with deliberation, because from the frequency with which the question has of late been presented to us, it is apparent that our construction of the law runs counter to the opinions of many lawyers of experience and caution. This is the more remarkable, since it is now demonstrated that we adhere to the interpretation of this court, adopted at an early day, and never departed from. It is a characteristic of the legal profession that it still retains that abhorrence of "vain conceits" which Lord Coke was fond of giving expression to, and prefer that their judges shall walk in the safe path, marked out by precedent and hedged on either side by authority; and we felicitate ourselves that, in now putting this phase of the question of jurisdiction at rest, we are guided by the wisdom and follow the instructions of our early predecessors.

It is a characteristic too of legal questions that, chameleon-like, they change hue and colour as the light falls upon them with differing refractions, and it may not be amiss to note, without discussing, the fact that where the husband dies, who is the head of the community and who has burdened it with obligations, the question of settlement and partition of such a community may present a very different state of facts, which might not be guided by a rule such as is manifestly applicable to the present case.

The judgment of the lower court is affirmed.

 No. 7406.

GOVY HOOD VS. HENRY FRELLSEN.

An insolvent who has made a voluntary surrender, and obtained a discharge under the Bankrupt Law of the United States, is estopped from suing to recover, or setting up a title to property, which he alleges was his at the time he surrendered in bankruptcy, but of which he avers he had made a simulated transfer, to prevent it from passing into the hands of his assignee, and thus protect it from the recourse of his creditors. "*Nemo allegans suam turpitudinem est audiendus.*"

A PPEAL from the Thirteenth Judicial District Court, parish of East Carroll. *Hough, J.*

W. G. Wyly, J. M. Kennedy, and Thos. J. Semmes for plaintiff and appellee.

J. W. Montgomery and H. G. Morgan for defendant and appellant.

The opinion of the court was delivered by

WHITE, J. The arguments, both oral and written, in this cause have

taken a wide range, but as we have formed a conclusion from the face of the papers, as explained by the documentary proof, we are compelled to state the facts and pleadings somewhat at length in order to make our conclusion clear.

In April, 1866, Henry Frellsen sued Govy Hood on seven notes drawn by him to the order of Stevenson & Frellsen, dated at various times between the 15th of October and the 10th of January, 1863, all bearing eight per cent interest from maturity until paid, amounting, in principal, to \$39,319 45. Hood confessed judgment, accompanied with stay of execution, which was accordingly rendered for a sum in principal and interest aggregating about sixty thousand dollars. On the 22d of July, 1868, under *feri facias* issued in execution of the judgment thus rendered; and after due proceedings on the 5th of September, 1868, the sheriff adjudicated to Henry Frellsen, the plaintiff in execution, the following mentioned property: A tract known as the "Home Place," one known as the "Black Bayou Place," and the undivided half of another known as the "Hood & Wilson tract." Subsequently, under an alias writ, other land was acquired by the plaintiff in execution, the amount of sales being duly credited on both writs. In December, 1868, Hood was adjudicated a voluntary bankrupt, his schedules showing him to be overwhelmingly insolvent, and his statement of assets containing no mention of the property above referred to; and in fact really no assets of any consequence. On the 27th of January, 1871, Hood was finally discharged. In May, 1871, Henry Frellsen sold to Hood for the sum of \$30,155, payable in six equal installments, evidenced by notes bearing eight per cent interest from date, the following property: The Home Place and a divided half of the Hood & Wilson Place, with another tract of land. The land thus conveyed being all land which Frellsen acquired at the execution sales already referred to. In December, 1874, none of the notes for the purchase price having been paid, Frellsen took executory process to enforce the payment of those which had matured. Whereupon the present controversy began by an injunction sued out by Hood on the following grounds, as stated in the petition:

1st. "Because at the time the aforesaid six promissory notes purport to have been executed, the said Henry Frellsen was indebted to your petitioner in the sum of \$13,300, which amount, together with legal interest thereon, ought to have been credited by said Frellsen on the first three of said mortgage notes as they respectively fell due. That said sum was for two notes, each for the sum of \$6,650, executed by Geo. G. Wilson to the order of petitioner, and transferred by petitioner to Stevenson & Frellsen, and known as the Hood & Wilson notes." The petition continues, and says: "Wherefore, petitioner pleads the said sum in compensation, and set-off of said Frellsen's claim, and avers that

Hood vs. Frellsen.

the attempt of said Frellsen to collect the whole of said notes sued on is a gross fraud, * * * it having been thoroughly understood at the time petitioner executed the same, that a sufficient amount or number of them be surrendered and cancelled to cover the aforesaid Hood & Wilson notes."

2d. "That for the year 1871 petitioner's Hood & Wilson Place was rented for the use of Frellsen for the sum of \$1200, the lease being in the name of Frellsen, which said sum the said Frellsen agreed also to credit on said notes sued on, * * * which sum is now pleaded in compensation."

3d. That for the year 1868 petitioner's plantations, known as the Black Bayou and Home plantations, were leased to one John W. Boice, and that the Home Place was also leased to Boice for the years 1869, 1870 and 1871; that all of said rents for the said years, which amounted in whole to the sum of \$12,500, were agreed by said Frellsen to be credited on said notes, and said amounts are pleaded in compensation.

4th. That at various times petitioner has sold a large number of town lots amounting to \$1200, which sum was also passed to the credit of said Frellsen, and which is pleaded in compensation of the notes sued on.

After charging fraud on the part of Frellsen, the petition concluded with a prayer for an injunction and for its perpetuation, that the notes sued on be cancelled and given up in consequence of their extinction by compensation for judgment for the overplus eight thousand dollars, and for damages.

On the 28th November, 1876, an amended petition was filed, reiterating the allegations of the original petition and praying trial by jury. On June 11, 1877, another supplemental petition was filed, which, in substance, averred as follows: That the original judgment was a consent judgment, and the sale under it a simulation, intended only to secure Frellsen and not to make Frellsen the owner, but simply to secure Frellsen's debt, an agreement being contemporaneously formed by which, although the paper title was to be in Frellsen, the real ownership was to remain in the plaintiff; that it was understood that Frellsen was to lease out the property and credit the rents, as well as those then due, as also those to become due in the future; that the George G. Wilson notes were given to Frellsen for collection in 1854, and had never been accounted for, and the amount of which he owes, as stated in the original petition; that at the time of confessing judgment he was in a feeble condition of mind and body; was unable to manage successfully his business; was entirely under the influence of Edward Sparrow, who was the counsel of Frellsen, who deceived and defrauded him in the interest of Frellsen. That at the time of the bankruptcy proceedings, which were gotten up by

Edward Sparrow, the agent of Frellsen, petitioner then believed they went in his, petitioner's, interest, but now he discovers it was all managed and concocted in the interest of Frellsen for the purpose of defeating the other creditors of petitioner, as well as petitioner himself, out of a large amount of money, over and above the amount due on the judgment in favor of Frellsen. That all papers were signed by him without examining them, and because advised by Edward Sparrow that they "were all right." That at the date of the execution of the sale and notes he was unaware that Frellsen had not credited him with the proper sums. That he signed the act of sale and notes because Edward Sparrow told him to in ignorance of his rights; that he now discovers that Frellsen and Sparrow had defrauded him by not accounting to him for the revenues of the property, as stated in the original petition by not accounting for the Wilson notes and other matters, as already averred. The prayer was identical with that of the original petition. Two additional supplemental petitions were afterwards filed, neither of which are of moment to notice, as they in no manner change the issues made by the supplemental petition already referred to. The plaintiff answered by averring that Hood had received all the credits he was entitled to, by a general denial, and by pleading Hood's bankruptcy as an estoppel. The dissolution of the injunction was prayed for with damages. The lower court perpetuated the injunction, except for a small sum. We think the injunction should have been dissolved and the demand of plaintiff in injunction have been rejected *in toto*. What is that demand when reduced to its last analysis but an averment on the part of Hood that at the date of his surrender in bankruptcy he had credits and rights in the hands of Frellsen, which it was agreed between them should be accounted for, not to the assignee, but to Hood, and which were therefore not surrendered, and which, it is complained, were not properly accounted for to Hood *after his discharge*? In other words, a dishonest bankrupt seeking to compel an account of moneys which he dishonestly concealed. What but an attempt to enforce judicially rights which, if ever existing, were so at the date of the bankruptcy, and therefore either passed to the assignee or were prevented from not legally but practically passing by the fraud, the false swearing—the crime of Hood himself? Under such circumstances can the ear of human justice be polluted by a story of it, may be a wrong, but, if so, necessarily a story of violation of both Divine and human law by the sufferer? Certainly not without a departure from that elementary principle expressed in the trite maxim of "*nemo allegans suam turpitudinem est audiendus*," which has been so often applied by this court. 6 M. 524; 9 M. 352; 3 R. 818; 4 R. 219; 2 A. 60; 12 R. 79; 1 A. 69; 12 A. 249.

In fact it would be shocking to every moral sense to admit for a

Hood vs. Frellsen.

moment that an insolvent debtor could place his property, his credits, his rights, in the hands of a third person, obtain the release from his debts by false swearing at the time of filing his schedules, at the time of his examination, at the time of his discharge; and then, after discharge, holding up all these oaths, taken and taken again in a solemn, judicial proceeding, invoke the aid of a court of justice, not in undoing the wrong committed, but in making it more successful. It was this view which caused our predecessors to say, in *Pardo vs. Pardo*, 26 A. 366: "In this case we see no legal ground upon which defendant can succeed. He is estopped from denying the truth of his oaths and judicial admissions in the insolvent proceedings." We are referred to *Ware & Sons vs. Morris*, 23 A. 665, as inculcating a contrary doctrine. If it did, we should consider it overruled by *Pardo vs. Pardo*. An examination, however, of the case of *Ware vs. Morris* satisfies us that the court did not go to the length claimed. The case was decided by a divided court, two dissenting, the judges who concurred in the decree placing their concurrence on grounds by them stated. True, one of the opinions is as claimed, but we are disposed to think that this view was not concurred in by a majority. Be this however as it may, if the case conflicted with the principle of *nemo allegans*, as applied to the matter before us, we could not adhere to it, but should overrule it, under the teachings of the almost father of our jurisprudence, saying: "They who come into court with unclean hands ought to be told *procul estote profani*, the temple of justice of your country is the house of God—it should not be made a den of thieves."

Nor can we agree with counsel that because none of the creditors of Hood proved their debts in bankruptcy, that a court can hear the story of his infamy with better grace. Would such proof not have been made if the rights, which he now avers were his, had been surrendered? The rule of *nemo allegans* is the offspring of no individual interest; it is enforced in behalf of society and morality in order that persons may be deterred from committing frauds by placing them beyond the pale of legal relief, in consequence of injury suffered by them in the accomplishment of a bad purpose.

If Hood had the rights which he claims, as to which we express no opinion whatever, the filing of his schedules in bankruptcy without mention of them, has debarred him from enforcing them. If in fraud of the law and of creditors he allowed his assets to remain in the hands of the defendant, we cannot lend the aid of legal machinery to enforce the rendition of a correct account when, without Hood's fraud, he could ask no account whatever. We will leave him where his own acts have placed him. We will deny him those rights which he has repeatedly, in the most solemn manner, under the obligations of his oath, declared

Hood vs. Frellsen.

he had not. We cannot hear him invoking the fraud of his agent, to annul an authentic act, when we cannot reach the alleged fraud of the claimed agent, without passing over the greater fraud of Hood himself. Because of our passing on the case under the hypothesis that Hood could not be heard to establish his own turpitude, we must not be understood as even indirectly indicating that the record sustains by proof the charges against the defendant in injunction ; into that investigation we have not entered.

The judgment of the lower court is reversed, and proceeding to render such judgment as should have been pronounced by the lower court, it is ordered and adjudged that there be judgment in favor of Henry Frellsen and against Govy Hood, rejecting the demand of said Hood, and that the injunction sued out by said Hood be dissolved, with one thousand dollars damages as counsel fees against Hood and J. Shelby Irvine, the security in the injunction bond.

Rehearing refused.

No. 7192.

FERD. M. GOODRICH VS. LOGAN HUNTON.

A discharge in bankruptcy is a good defence, if pleaded and proved before judgment. It is no ground on which to annul a judgment.

Where a person is sued as a resident of a parish where the suit is brought, and is personally cited, a judgment regularly confirmed on default against him will be *res adjudicata* against a plea that he resided elsewhere.

A PPEAL from the Fourth District Court, parish of Orleans. *Houston, J.*

Geo. L. Bright for plaintiff and appellant.

J. Ad. Rozier and *Thos. Hunton* for defendant and appellee.

The opinion of the court was delivered by

SPENCER, J. This case was before us in 1877 on an appeal from an order of removal. Goodrich having died pending that appeal, D. N. Barrow, as his administrator, was made party by order of this court. We reversed the order of removal and remanded the cause for further proceedings and trial on the merits. The trial resulted in a judgment in the court below against plaintiff, who appeals.

Goodrich was a member of the firm of Goodrich & Pilcher of New Orleans. In 1866 Hunton, alleging that the members of said firm were both residents of New Orleans, sued them on a note. Citation was served on Goodrich *in person, in this city*. Not answering within the legal delay, a judgment by default was regularly entered against him. This default stood unconfirmed until 1874, when it was, on proof, made

Goodrich vs. Hunton.

final. Pending the suit, Goodrich became a bankrupt, and was discharged.

The present suit is to annul the judgment thus obtained by Hunton, on two grounds, to wit :

First—That Goodrich had been discharged in bankruptcy.

Second—That he was a resident of Carroll parish, and could not be sued in Orleans.

First—A bankrupt's discharge is a good defence, if pleaded and proved before judgment. It is no ground to annul a judgment upon.

Second—Goodrich was alleged to be a resident of the parish of Orleans, and was cited personally therein to answer. This he neglected to do, though he had most ample time.

We adhere to the views expressed in *Phipps vs. Snodgrass*, 31 An. 88. As a consequence, we hold that where a person is sued *as a resident* of the parish *where the suit is brought*, and *is personally served with citation therein*, a judgment regularly confirmed on default against him will be *res adjudicata* against a plea that he resided elsewhere.

Whether in such case the exception of non-residence, can or cannot be pleaded after default is entered, is a question of no moment here. It cannot be pleaded after final judgment. To so hold would put every judgment confirmed on default at the mercy of men's memories, and subject litigants to unending lawsuits, to establish the validity of judgments obtained, and final perhaps years before, and upon the faith of which reposes the security of titles of vast amounts of property. We limit ourselves to the case where the non-resident party is sued *as a resident, and is personally cited as such, within the parish*. For if the service be domiciliary, as a non-resident could have no domicile in such parish, the judgment would be null for want of citation.

Barrow, as administrator, was made party to the suit in, and by order of, this court. When the case was remanded he continued to be a party and no further order to that effect was necessary.

The judgment is affirmed with costs.

DISSENTING OPINION.

MARR, J. After this cause was remanded to the district court, on the appeal from the order of removal into the circuit court, 29 An. 372, Hunton answered; and he stated in his answer that Goodrich was dead. No other suggestion of the death was made in the district court. Barrow, the administrator, who had been made a party, in this court, to the appeal from the order of removal, was one of the attorneys for Goodrich, in this suit, from its inception. The case proceeded; and final judgment was rendered "in favor of defendant, Logan Hunton, and

against plaintiff, Ferdinand M. Goodrich, dissolving and setting aside the injunction," etc.

Barrow's first appearance in the district court, in his capacity as administrator, was in the motion for an appeal from the final judgment, and he gave the requisite bond as appellant. To say the least of it, the judgment was irregular; and if it is not a mere nullity, I think it should have been corrected in the court of original jurisdiction. Perhaps, if appellee had joined in the appeal and had asked that the judgment be amended in this respect, this court might have substituted the name of Barrow, the living representative, for that of Goodrich, who was no longer amenable to human tribunals. Until this has been done, in some way, I do not think we can deal with the judgment appealed from as an existing reality.

By our law, suits do not abate by the death of the parties; but where the plaintiff dies, until his successor appears and becomes plaintiff in his stead, there is no suit; and no judgment can be rendered. Barrow was a party to the appeal; but the only question in that case was as to the legality of the order of removal; and when the cause was remanded for further proceedings, he should have been made party plaintiff; and the record of the district court should have shown that he was a party to all the proceedings subsequent to the death of Goodrich.

This point was not raised by counsel; but we cannot ignore it: nor can they by act or omission give effect and validity to a judgment against one no longer in being.

If we could consider the case on its merits, I do not think the Fourth District Court of Orleans had jurisdiction of the original suit of Hunton; and I think the judgment in that suit, in favor of Hunton against Goodrich, was void for want of jurisdiction.

The proof is plain that Goodrich lived in Carroll parish from 1842 to the time of his death, in 1876, except for ten months, from November, 1872, to September, 1873, when he lived with his family in a rented house in New Orleans. He was a member of the Bar since 1849; and since his marriage, in 1853, he lived with his family, in his own dwelling, at Lake Providence, except for the ten months just mentioned. Before the war, in 1859, he bought a house in New Orleans; but he never occupied it: it was occupied by his father-in-law Pilcher. He was a member of the commercial firm of Pilcher & Goodrich of New Orleans, which virtually ceased to exist, and went out of business during the war; and in July, 1865, it was announced in the *Picayune* that that firm had been dissolved in June, 1865; and that it had been succeeded by the firm of Pilcher & Barrow. According to the views expressed by us in *Ranlett vs. Collier White Lead Co.*, 30 An. 58, he was not subject to the jurisdic-

tion of the courts of Orleans, at the time the suit was brought and citation served, in April, 1866.

The general rule is, that one having a domicile in the State must be sued in the court of his domicile. C. P. arts. 89, 162. To this rule there are exceptions, none of which are applicable to this case, except that laid down in Code Practice, art. 93: "If one be cited before a judge, whose jurisdiction does not extend to the place of his domicile or of his usual residence, but who is competent to decide the cause brought before him, and he plead to the merit, instead of declining the jurisdiction, the judgment given shall be valid, except the defendant be a minor."

This language is plain. It is the voluntary act of the defendant, his submission to the jurisdiction, by pleading to the merit, and it is this alone which gives validity to the judgment of a court which would otherwise be without jurisdiction *ratione materiæ*. As the law-maker has chosen to make this exception, the courts cannot enlarge it, or give to some other act or fact the effect which the law has given to the voluntary appearance of defendant, and his plea to the merit.

It is argued that art. 333, C. P., attributes to the judgment by default the same effect as that given to the plea to the merit by art. 93. Article 333, as originally adopted, was: "It is a rule which governs, in all cases of exceptions, except in such as relate to the absolute incompetency of the judge before whom the suit is brought, that they must be pleaded specially, *in limine litis*, before issue joined, otherwise they shall not be admitted."

Under the dominion of this article, this court held in *Magee vs. Dunbar*, 10 La., in 1837, that "there is a class of exceptions which the Code requires to be pleaded *in limine litis*, before issue joined, which we understand to be an answer to the merits, and that an issue is tacitly joined by a judgment by default; but when that judgment is set aside by filing an answer, it is as if it had never existed."

The court had just said: "The filing of an answer is a matter of right; and does not depend upon the discretion of the court, nor does the Code appear to us to restrict the defendant in relation to the exceptions which he may plead in such a case." The case with which the court was dealing was one in which a default had been taken; and it had been set aside on the appearance of defendant and his filing an answer, the beginning of which was a dilatory exception. The district judge had ordered that part of the answer stricken out, on the ground that issue had been joined by the default; and it was too late to set up a dilatory exception.

It will be observed that by article 336, of the C. P., "declinatory exceptions *may be* pleaded in the defendant's answer, previous to his answering to the merits; but, except as relates to the declinatory exceptions,

the defendant *must* plead in his answer all dilatory or peremptory exceptions," etc. So that, in the view of the court, at that time, when the default was set aside, the defendant might plead in his answer all such exceptions as he could have pleaded if such default had never been taken, and the legislature was of the same opinion; for, in 1839, by Act No. 53, section 23, p. 172, it was enacted that, "Hereafter no dilatory exceptions shall be allowed in any case, after a judgment by default has been taken; and, in every case they must be pleaded *in limine litis*, nor shall such exceptions hereafter be admitted in an answer in any case."

This section, in the words quoted is now the second paragraph of Art. 333; and the first paragraph is the article as adopted originally. The meaning is plain. By the first paragraph no exception, save as to absolute incompetency shall be allowed after issue is *actually* joined by answer filed. Of course this does not include such peremptory exceptions founded in law, *res adjudicata*, prescription, etc., which may be pleaded at any stage of the cause before final judgment. By the second paragraph, no *dilatory* exception shall be allowed after issue is *tacitly* joined by default.

It is assumed that the plea of domicile is a dilatory exception, and that it cannot be pleaded after issue joined; and the argument is, as the default is a *tacit* joinder of issue, the court which had not jurisdiction, by reason of the domicile, acquires jurisdiction by default, and may validly proceed to judgment. The answer is that art. 333 plainly makes the distinction between the voluntary appearance and act of defendant in joining issue by his answer, and the tacit issue joined by default. In the first case ALL exceptions, except such as relate to the absolute incompetency of the judge, are cut off by answer filed: in the second case all DILATORY exceptions are cut off by default. "Dilatory exceptions are such as do not tend to defeat the *action*, but only to retard its progress." C. P. Art. 332. "Declinatory exceptions do not tend to defeat the *demand*;" but they do tend to defeat the *action*: that is, if they are maintained, the *suit* must be dismissed. Arts. 334, 335.

There are two kinds of declinatory exceptions, 1st: "When the exception is taken to the competency of the judge, pursuant to the rules above provided." The other is *lis pendens*. The rules thus referred to, "provided above," are those which relate to the *competency* of the judge, art. 86, *et seq.* Art. 87 prescribes the manner of ascertaining whether the judge be competent, that is, by considering: 1st. The object or the amount in dispute. 2d. The person of the defendant. 3d. The place where the action is to be brought.

Article 89 lays down the general rule that the defendant must be sued at the place of his domicile or usual residence, and art. 93 is the exception to that rule, considered with reference to the competency of the

judge. If the defendant plead to the merit, the judge, competent with respect to the object or the amount in dispute, and competent with respect to the place at which the suit is brought, is also competent with respect to the person of the defendant, who, by pleading to the merit, has submitted, voluntarily, to a jurisdiction from which he would otherwise have been exempt.

From these several articles the following rules are clearly deducible:

1st. After answer filed, all exceptions, whether *dilatory* or *declinatory*, are cut off. Arts. 93 and 333, paragraph 1.

2d. After judgment by default, all *dilatory* exceptions are cut off. Paragraph 2.

3d. The *declinatory* exception to the competency of the judge, as provided in arts. 87, *et seq.*, is cut off only by the *actual* joinder of issue, by answer or plea to the merit. Of course want of competency, *ratione materiae*, may be set up at any time.

The consequence follows, logically, and irresistibly, that the judgment by default does not give jurisdiction to the judge, incompetent by reason of the domicile of the defendant; and if he proceed to judgment, in confirmation of a default, the defendant may attack that judgment for nullity for want of jurisdiction, and have it declared void, on proper proof.

Jurisdiction, the competency of judges, is the creature of the law; and our law has taken care to define it by precise rules. It exists only where it has been conferred by law. The attempt of a judge to exercise power and authority not conferred by law, is usurpation, and is void. The Code of Practice makes but a single distinction between jurisdiction *ratione materiae*, and jurisdiction *ratione personae*: and that is: want of jurisdiction, of competency *ratione materiae*, cannot be cured by the act or consent of the parties; while want of jurisdiction, of competency, *ratione personae*, may be waived by the consent and act of the defendant, in the manner, and only in the manner prescribed by law, that is, by the voluntary appearance of the defendant, and his answer or plea to the merit. All judgments rendered by judges not competent in the sense of arts. 86, *et seq.*, are void. The competency of the judge *ratione personae* is as absolute as incompetency *ratione materiae*, except, that in the manner authorized by and prescribed in art. 93, the defendant, if he chooses, may remove the incompetency *ratione personae*.

The case of Phipps vs. Snodgrass, *ante*, p. 88, is relied upon as establishing a different doctrine. That case was decided correctly; but it differs widely from this.

Phipps brought suit against Snodgrass and wife, on her note and mortgage. Service was made on both at their domicile in New Orleans, as shown by the sheriff's return; and in due time judgment by default

was taken against both. She alone filed an exception, in these words:

"Now into court comes Mrs. R. Snodgrass, and for her exception to the plaintiff's suit pleads that she resides out of the jurisdiction of this court, and she prays that plaintiff's suit be dismissed, and for all general relief."

In *Adlé vs. Anty*, 1 An. 261, and *Tillett vs. Upton*, 12 An. 146, it was held that where default has been taken against husband and wife, and she appears alone and pleads, the default cannot, legally, be set aside; and plaintiff may disregard her plea, and have the default confirmed. That is what was done in this case. The exception was never tried. Mrs. Snodgrass made an attempt to have the case removed into the U. S. C. Court; but her bond, like her plea, was without the aid and assistance of her husband. The defendants appealed to this court. There was no proof on their part; and the question really was, whether the default was properly confirmed.

Her plea, beside her utter want of capacity to appear in court without the authority of her husband, R. C. C. art. 121, contained no cause of exception. The truth of the plea, as matter of fact, was disproved, *prima facie*, by the sheriff's return of service at the domicile. Her petition for removal, declared that she was a citizen of the State of Louisiana; and her exception did not disclose her place of residence. It was a mere nullity in form and in substance; and if her husband had joined her in the plea, the judge could not have allowed it to prevent the taking of a default, or the confirmation of the default.

In Goodrich's case the want of competency of the judge is pleaded and set forth with minuteness and detail of dates and circumstances; and the proof of the alleged domicile is complete. No act, no plea, no consent on the part of Goodrich invested the judge with jurisdiction, or deprived Goodrich of the right to be sued only before his own judge and at his domicile. It is the misfortune of Hunton if he resorted to a tribunal not having jurisdiction; but he could have learned by inquiry of Pilcher & Barrow, successors of Pilcher & Goodrich, that the latter firm no longer existed; and that Goodrich resided at his domicile in Carroll parish. He did ascertain the names of the persons who composed the firm of Pilcher & Goodrich; and he set them out in full in his petition. One question more of the person who gave him the names would probably have given him full information as to the domicile of each of them respectively. Hardship or inconvenience cannot control the application of positive law; but the hardship in this case is more apparent than real.

The jurisdiction of the courts should be fixed and settled; and I would yield my opinion to that of my brethren, in this case, if I could do so consistently. My convictions are such that I cannot assent to the

Goodrich vs. Hunton.

conclusions of the majority of the court: and the importance of the questions constrains me to give thus fully the reasons for my dissent. If we can deal with the case, I think the judgment appealed from should be reversed: that the judgment in the original suit, in favor of Hunton against Goodrich, should be declared null and void for want of jurisdiction, competency; and that the injunction granted *in limine* should be reinstated and perpetuated.

No. 6009.

MRS. A. SEWELL ET AL. VS. ROBT. WATSON.

Vacant property, whose owner does not reside in the parish where it is situated, may be validly assessed as the property of its immediately preceding, but deceased owner, of whose succession it is a part and in whose name it stood on the public records.

The valid judgment of a court, rendered in a monition proceeding, homologating a tax sale of property, has the force of *res adjudicata* and operates as a complete bar against minors, and all other parties in interest, on account of any illegality or informality in the proceedings whether before or after the judgment, and shall be conclusive proof that the sale was made according to law.

A PPEAL from the Sixth District Court, parish of Orleans. *Saucier, J.*

Merrick, Race & Foster for plaintiffs and appellees.

J. Q. A. Fellows for defendant and appellant.

The opinion of the court was delivered by

WHITE, J. Plaintiff institutes this petitory action to recover certain real estate, described in the title upon which she relies as "three certain lots of ground designated by the letters C, D and E, in square No. 1, situated in the town of Bloomingdale." She prays in addition for a judgment for the rents and revenues.

The defendant admits possession; claims that such possession has continued since 1861, he having purchased the property in December of that year from J. M. Bach by act before Edward Barnett, notary. That his vendor purchased the same on the 10th day of December, 1851, at a sale made by the tax collector of the parish of Jefferson; that any defects in said tax sale were cured by monition duly homologated on the 11th of February, 1862, and denies that the property has produced revenue; avers the payment by himself and vendor of taxes, and prays "that his right to claim damages and the reimbursement of taxes as alleged be reserved him." By supplemental answer, he avers payment of taxes to an amount exceeding five hundred dollars, for which he

prays judgment in reconvention, in the event of plaintiff being decreed to be the owner of the property. Subsequently, he filed the plea of the prescription of ten years. The lower court decreed the plaintiff to be the owner of the property, and rejected the claim for revenues as well as the reconventional demand; the defendant appealed, and the appellee answered by a prayer for the allowance of revenues.

We will first notice the question of title. The facts, as disclosed by the record, are as follows: On the 18th of April, 1848, James H. Coleman bought the property in controversy at a sheriff's sale. In March, 1849, James H. Coleman died, leaving a widow and minor child, then about three years of age. His succession was opened in the same month and year by the qualification of his widow as natural tutrix of his minor child. On the 18th May, 1849, the widow was appointed administratrix; an inventory was taken, but the property now claimed was not included in it. On the 7th of April, 1850, Mrs. Coleman died, and W. H. Dameron was appointed her executor, and in June, 1851, the same person was appointed administrator of the succession of James H. Coleman, made vacant by the death of Mrs. Coleman. On the 10th of December, 1851, the tax collector of Jefferson parish sold to J. M. Bach as the property of James H. Coleman, "according to tax roll of 1850," the property now sued for. On the 23d December, 1861, Bach applied for a monition as to this sale, which was duly homologated on the 11th of February, 1862. On the 27th December, 1861, Bach sold all his right, title, and interest in and to the property sued for to Robert Watson, the present defendant. On the 11th of December, 1871, Agelina Coleman, wife of Sewell, was recognized as the sole legal heir of her deceased father and mother, and as such put in possession of their estate.

All the foregoing facts are abundantly established by the documentary proof in the record, *except the proceedings and sale of the tax collector to Bach*, which are not in the record, and do not appear to have been offered in evidence, as they are not mentioned in the note of evidence—although the briefs of both the counsel for plaintiff and defendant seem to consider that the record of the proceedings which caused the tax collector's sale, and a copy of such sale, is in the transcript. Under this condition of proof we have taken the statement of the sale by the tax collector from the briefs of counsel, from the recitals contained in the sale from Bach to Watson, and from the monition proceedings.

The plaintiff and appellee relies on the following propositions as conclusively demonstrating the nullity of the tax assessment and sale thereunder: 1st. That the property was assessed in the name of James H. Coleman on the rolls of 1850, while he died in 1849. 2d. Because the tax sale was made against Coleman.

We think neither ground good. The property stood on the public records as that of James H. Coleman, and was so assessed. It was vacant property, and the owner did not reside in the parish. The assessor in listing the property for taxation could have assessed it in no other way than as it stood on the records of the country, unless it be considered that it was his duty to be informed of facts not public, not to be ascertained from the condition of the property or from its occupants, for it had none.

This court, in *City of New Orleans vs. Ferguson*, 28 A. 240, held that an assessment in the name of Mrs. J. A. Ferguson, without adding the words "estate of," made after the death of Mrs. Ferguson, was binding; and we see no good reason to depart from the rule thus laid down.

The estate of Coleman was under administration in the parish of Orleans, and the assessment in the name of estate of James H. Coleman would, even according to the views of appellee, have been binding, and we think was so in the name of James H. Coleman. We of course express no opinion as to whether such would be the case as to an assessment against a resident or even against a non-resident of seated property.

2d. The assessment being valid, the validity of the sale is the necessary result. By the third section of the act No. 81 of 1845, session acts of 1845, p. 39, the possession of the rolls, duly made out, by the tax collector, operated as an execution in his hands, and such being the case irregularities in execution of the process have long since, by effect of the monition, passed beyond the reach of judicial examination.

"The judgment of the court confirming and homologating the sale shall have the force of *res judicata*, and operate as a complete bar against all persons, whether of age or minors, whether present or absent, who may thereafter claim the property sold in consequence of an illegality or informality in the proceedings, whether before or after judgment; and the judgment of homologation shall in all cases be considered as full and conclusive proof that the sale was duly made according to law in virtue of a judgment or order legally and regularly pronounced in the interest of parties duly represented." R. S. 2376.

The judgment below is reversed; and judgment be and the same is hereby rendered in favor of the defendant and against the plaintiff, recognizing defendant, Robert Watson, as owner of the property in controversy, with costs against plaintiff in both courts.

No. 7501.

THE PEOPLE'S BANK VS. AMELIE GIROD, WIFE, ETC.

Parol evidence is admissible to prove the interruption of prescription.

A revocatory action to annul a mortgage made by an insolvent to secure a pre-existing debt, on the ground that the mortgage gave the creditor in whose favor it was made an unjust preference, is prescribed in one year from the date of the mortgage.

A PPEAL from the Fourth District Court, parish of Orleans. *Houston, J.*

E. H. McCaleb for plaintiff and appellant.

J. Ad. Rozier and *T. Gilmore & Sons* for intervenors, appellees.

Robert Mott for public administrator.

The opinion of the court was delivered by

SPENCER, J. This is a revocatory action brought by plaintiff, who is joined by intervenor, to have annulled and set aside as fraudulent and simulated, first, a notarial act of mortgage, executed by Joseph Girod, on 14th June, 1876, in favor of his four daughters, Constance, Amelie, Angel, and Elodie, to secure to them \$4000 each, which he therein acknowledges to owe them; second, a judgment rendered in their favor against their father for the amount of said mortgage debt.

The debts held by plaintiff and intervenor against Girod arose from his notes given in December, 1874. Judgments were rendered in their favor against Girod in 1878. This suit in revocation was brought in 1878.

The grounds upon which plaintiff's demands are founded are, in substance, that Joseph Girod was not indebted to his daughters, as set forth in said act. That if he ever owed them anything, the debt was barred by prescription at the date of said mortgage, which prescription is specially pleaded; that Girod was at the time and to the knowledge of his daughters, insolvent; that the judgment was by consent obtained before the pretended debt was due, and was but the execution of a conspiracy to defraud the father's creditors, and conferred unjust preference.

The defendants plead a general denial, prescription of one year, and aver the justness and legality of their mortgage and judgment.

The evidence is very voluminous. It shows that Joseph Girod and his wife were married in 1829; that he received large sums of money coming to her from her parents and grand parents; that she died in 1858, leaving five children—the four daughters named and a son, Didier; that the son died in 1863, without other heirs than his father and four sisters.

After the death of Mrs. Girod in 1858, an inventory showed com-

The People's Bank vs. Girod, Wife, etc.

munity property to over \$40,000 in amount. The eldest child, Constance, being then of age, conveyed to her father her share therein for some \$4400, of which she in the deed acknowledges receipt. The father then had all the community property held by the minors adjudicated to him, and executed a special mortgage thereon in their favor to secure their part of the price. It is shown abundantly by oral and written evidence that the transfer by Constance to her father was without consideration, and made to enable him to give the special mortgage to the minors more satisfactorily to the court. In 1863 Girod, by authentic act, long before plaintiff's rights arose, recognized these facts and acknowledged his debt to Constance, and granted her a special mortgage to secure it.

The evidence does not leave the shadow of a doubt that on 14th June, 1876, when Girod executed the mortgage in question he honestly owed his daughters every dollar of the amount there acknowledged and even more. The only questions are, was the debt barred by prescription at that time, and if so, was Girod insolvent. An insolvent debtor can not revive and resuscitate a prescribed debt to the prejudice of his creditors.

The weight of evidence goes to show that at that time, July, 1876, his property was assessed at about \$63,000; and that two experienced real estate brokers made an estimation of it then at about \$51,000. Their estimate was based upon its value at private sale, on the usual terms of one-third or one-half cash and the balance on time. His debts outside of the claim of his daughters did not exceed \$32,000. His solvency was to say the least doubtful, and some two years later, his property, sold at forced sale, proved largely insufficient to meet his debts. The evidence showing interruption of prescription, consists of the act of mortgage in 1858 to the minors and that of 1863 to Constance. Under these acts no notes were given, but the debts were acknowledged. At various times, the father sold different pieces of these mortgaged properties, and the daughters intervened in the acts, and-reciting their claims, relinquished their mortgages upon the properties sold, reserving their rights otherwise. There is oral evidence, and written memoranda of Girod, tending to show that he repeatedly acknowledged his liability to his children. They were his daughters, living with him, and caring for him in his old age. He justly owed them large amounts. It is entirely reasonable and natural that he should have spoken to them often in acknowledgment of their claims upon him. The evidence is strengthened by the inherent probabilities of the case. Verbal acknowledgments may be proven to interrupt prescription, but evidence of oral renunciations of an already acquired prescription is inadmissible. The evidence satisfied the judge *a quo* that the debt of Girod to his daugh-

The People's Bank vs. Girod, Wife, etc.

ters was indisputably just and honest, and that it was not barred by prescription in July, 1876, when the mortgage was given. We are led to the same conclusion.

We have seen that at that time Girod's insolvency was by no means notorious—in fact, if we are to credit experts in property values, he was solvent. The daughters are not shown to have known the extent of his liabilities, which were all precipitated upon by endorsements for other people. The evidence is that they did not know, and had not reason to suppose, him insolvent.

But be this as it may, their debt was a just one, and the only ground upon which their mortgage can be attacked, is that it created in their favor an unjust preference. The action to annul for this cause must be brought *within one year from the date of the contract*. C. C. (old) 1982. That the plaintiff and intervenor have not done, and the plea of prescription by defendants was rightfully maintained.

We do not think this a proper case for damages.

Judgment affirmed, at costs of appellants.

Mr. Justice WHITE, being recused, takes no part in this decision.

No. 6700.

JOHN CHAFFE & SONS VS. ERNEST HEYNER.

An order of appeal on motion in open court which fixes the return day on a day this court is not in session is not ground for dismissing the appeal. Such an order, although made in compliance with the motion of appellant's attorney, is the act of the court, and hence the error of it is not imputable to the appellant.

A charge by a factor "for advancing" money, over and above eight per cent per annum interest, can not, under the general issue, be recovered.

Where cotton, which had been transferred by a planter in a neighboring State, under the form of conveyance of the common law chattel-mortgage, to secure a certain creditor, is afterwards shipped by a common carrier *for the account* of the creditor, the delivery of the cotton to the carrier, is a transfer of the legal title to the creditor, who thereby becomes in effect the consignor, and whose rights of ownership of the cotton can not be affected by an attachment levied by any other creditor of the shipper.

The action of a consignee in accepting or refusing a consignment can not affect the consignor's title to the goods consigned.

Where two lots of goods are consigned by one single bill of lading, for account of two different persons, the consignee can not accept the consignment as to one lot, and refuse it as to the other. If he accepts as to one, he thereby accepts as to both.

A PPEAL from the Fourth District Court, parish of Orleans. *Houston,*
J.

Bayne & Renshaw for plaintiffs and appellees.

E. Evariste Moïse and *Hornor & Benedict* for intervenors and defendants, appellants.

The opinion of the court on the motion to dismiss was delivered by MANNING, C. J. On the merits the opinion on the original hearing was delivered by SPENCER, J., and on the rehearing by WHITE, J.

ON MOTION TO DISMISS.

MANNING, C. J. This appeal was taken by motion, and is returnable on first day of November 1877, instead of the first Monday of November, which is the opening day of the term. The motion to dismiss is based upon the ground that no appeal can be made returnable on the first day of November, the court not being in session then. The ruling in *Rains v. Kemp* is cited by the appellee as conclusive upon the question, it being said there that an order of appeal, returnable on a day on which the court does not sit is equivalent to an order allowing the appeal to be returned on any day, or not to be returned at all, and may be treated as a nullity. 4 La. 318.

But that case was decided in 1832, and the statute of 1839 operated a great and necessary change in the mode or causes for which appeals were dismissable. The rankest injustice had been so often done by the dismissal of appeals for all manner of technicalities and informalities, that provision was then made, saving parties appellant from dismissal for defects or irregularities not imputable to them. Rev. Stats. 1870, sec. 36.

It is alleged however here that the defect is imputable to the appellant, because the motion is written by his attorney and the day is fixed therein, and the judge merely adopted the day thus fixed.

An order of court, whether written by the attorney of one of the litigants or by the clerk, is the act of the judge. In the country parishes, the habit of lawyers is to write the judgments for the judge who signs them, and such judgments thus signed are no more the acts of the attorney than is an order of appeal, such as that made in this case, and which is written by the attorney, as is the habit of practitioners here. It was the judge who made the order of appeal, and who named an improper day for its return, and the appellant cannot be prejudiced by his act.

It was lately held that where an application for appeal was made in writing, and the time for its return made by the judge was the same as that asked by the appellants, the error was their own and they must bear its consequences. *Citizens Bank v. Ruty*, 26 Annual, 747. It would seem that the appeal in that case was made by petition in which the appellant formally and expressly mentioned the return day. Perhaps we

Chaffe & Sons vs. Heyner.

should not have ruled as the court then did, but in the present instance we hold that the order of appeal is the act of the judge and a mistake of a return day made by him cannot be visited upon the appellant.

The motion to dismiss is denied.

ON THE MERITS.

SPENCER, J. The controversy in this case is limited to the ownership of the ninety-five bales of cotton, shipped by Ernest Heyner, from Vacluse Landing, in Arkansas, per steamer Pargoud, to John Chaffe & Sons, "for account of Frank & Co."

The facts are as follows: Heyner was a planter in Arkansas. He was indebted to Frank & Co. of Memphis in a sum of \$4,629 46, evidenced by two notes. On the 29th March, 1876, in order to secure them the amount of said indebtedness, at dates specified, he executed in the usual form (a conditional sale) a common law chattel mortgage, "all of his interest of every kind and nature whatsoever in the crop of cotton which may be raised during the present year, 1876, on the Heyner place in Chicot county, and also thirteen mules and five wagons now on said plantation, and all the farming implements," etc. "And I do further agree that, as fast as the cotton * * * is prepared for market, I will ship the same to a responsible factor in the city of New Orleans (to be selected by me) in my name, for the account of the said Frank & Co., and that the proceeds arising from the sales of said cotton * * * shall be applied first to the payment of any open account or unsecured indebtedness which they may hold against me, and next to the payment of the indebtedness herein secured according to the maturity thereof."

It seems that during the year 1876 Frank & Co. made further advances to Heyner, swelling their total debt to about \$6500. Heyner, also, during said year obtained advances and supplies from Chaffe & Sons to amount of six or seven thousand dollars, giving them a lien on his crops.

On 11th February, 1877, Heyner shipped, per Pargoud, to Chaffe & Co., two lots of cotton, embraced in one bill of lading, as follows:

Ninety-five bales, marked "Heyner," for account of Frank & Co.; seventy-six bales, marked "Heyner," for account of shipper.

The Pargoud reached New Orleans about six o'clock in the morning, and the bill of lading was delivered to Chaffe & Sons between eight and ten o'clock same day. About twelve or one o'clock same day Chaffe & Sons notified the boat that they would not accept the consignment of the ninety-five bales shipped by Heyner for account of Frank & Co. In the meantime, however, most of the cotton had been hauled away to the press, where Chaffe & Sons stored their cotton, by

Chaffe & Sons vs. Heyner.

employees of the press. It is shown, however, that this was not done by the direction or consent of Chaffe & Sons. On the same day, February 15, 1877, Chaffe & Sons brought this suit and attached the ninety-five bales of cotton, as the property of Heyner, to pay the balance due them on account.

Frank & Co. intervened, and allege "that they are the owners" of the said cotton attached by Chaffe. "That they became the owners of said cotton in the manner following, to wit: That Ernest Heyner, defendant herein, who resides in Chicot county, Arkansas, being indebted to your intervenors in the sum of \$6500, * * * on the 8th February, 1877, in further satisfaction of said indebtedness, *gave in payment* to your intervenors ninety-five bales of said cotton, at Vaucluse Landing, Arkansas, the same being then and there accepted by your intervenors through said Jacob Frank, a member of the intervenors' firm; that after the acceptance of said cotton as aforesaid, * * * the ninety-five bales of said cotton were shipped by Ernest Heyner from Vaucluse to said Chaffe & Sons, and the bills of lading * * * were made for account of Frank & Co."

They further allege that on arrival at New Orleans the cotton was duly received by Chaffe & Sons and sent to the press; that by accepting said bill of lading the said Chaffe & Sons accepted it with the conditions therein expressed, to wit, that said cotton belonged to intervenors, and was their property, and to be held subject to their order by said Chaffe & Sons, and as trustees for intervenors. They pray to be decreed owners of the cotton, and that the same be held not liable to attachment by Heyner's creditors.

The answers are general denials. There was judgment for plaintiff against defendant for \$3420 14, with legal interest from judicial demand, viz, 16th February, 1877, with privilege on the property attached, and rejecting the demands of intervenors. Defendant and intervenors appeal.

As between Chaffe and Heyner the account is fully proved, but we find charges therein to amount of \$110 49 as commissions "for advancing" money, in addition to eight per cent interest. This amount cannot, under the *general issue*, be recovered, and must be deducted from the balance decreed to be due, thereby reducing it to \$3309 65.

There is no plea made by defendant, or even suggestion in argument, that plaintiff forfeited all interests by taking a written contract for more than eight per cent, and that question need not therefore be discussed. The only objection is to the excess of interest over five per cent. The conclusion we have reached makes defendant's debt to plaintiff \$3,309 65, instead of \$3318 93, as conceded by defendant's counsel in his brief.

So far as Frank & Co. are concerned, they are plaintiffs by intervention. They allege themselves to be the owners of the ninety-five bales of cotton in controversy. It is incumbent on them to prove their ownership affirmatively. Both parties claiming under Heyner, his ownership originally of this cotton cannot be denied. Intervenors *allege* that they acquired said cotton from Heyner by a *giving in payment* on the 8th of February, 1877. That is their *specific* allegation, and we are at a loss to understand how their counsel say "that the cotton was not claimed by them under the *dation en paiement*." But we propose to examine their claim of ownership, in all its aspects *as argued*, and as prosecuted by the evidence offered. We propose to inquire—

First—What was the effect of the contract of mortgage given by Heyner to Frank & Co. on the crop of 1876, to be grown, and how far the courts of this State will enforce such a contract to the prejudice of its own citizens?

Second—Was there ever a valid and complete sale or *dation en paiement* of these ninety-five bales of cotton as against third persons?

Third—Did the shipment of the said cotton by and in the name of Heyner to Chaffe & Sons, for account of Frank & Co., vest the title in Frank & Co. when Chaffe & Sons refused the consignment?

Fourth—Did Chaffe & Sons in fact accept the consignment? In relation to this last point, we may dispose of it in a few words. Chaffe & Sons, not only did not accept the consignment, but with great promptitude refused it and gave immediate notice thereof. This they had a perfect right to do, and the fact that they accepted the consignment of the seventy-six bale lot in no wise compelled them to accept the ninety-five bale lot shipped under different conditions. The two were entirely separate, and they had a right to treat them as separate shipments.

As to the contract of mortgage, it is contended with much earnestness that at common law the effect of a chattel mortgage, as this was, is to vest the legal title in the mortgagee, and that therefore Frank & Co. must be regarded as owners of the crop of 1876, from the date of the mortgage. The terms of that instrument are entirely inconsistent with such a proposition. As we have seen, the agreement was that Heyner should ship the cotton *in his own name* to a factor of *his own choice* in New Orleans, and "that the *proceeds* arising from the sale" were to be applied to Frank & Co.'s debt. It never was intended by that act to make Frank & Co. the owners of the cotton, but simply to secure them its proceeds after Heyner had caused it *to be sold in this State*. Nor are we prepared to assent to the proposition that this contract is to be governed by the laws of Arkansas, even were those laws in evidence, which does not appear to be the case. There is no mention

whatever of their introduction in the note of evidence, and the fact of the judge and counsel arguing about them, does not change the fact that they were not introduced.

This was not an *executed* but an *executory* contract, and it was to have its execution in the State of Louisiana. In *Beirne vs. Patton*, 17 La. 590, this court correctly announces that "it is a well settled rule that, where a contract is either expressly or tacitly to be performed in another place than that where it is made, its validity is to be governed by the law of the place of performance." *Story's Conflict*, p. 233; 2 *Kent's Com.*, pp. 393, 459. If we apply the law of Louisiana to this chattel mortgage, so far from its being good to vest title in the mortgagee, it is void, even as a security, unless the movables be actually delivered as a pledge.

But there is another and stronger reason why we cannot give effect to this mortgage or conditional sale. "While we recognize the principle that all contracts in regard to personal property must be regulated by the *lex loci* of the domicile of the owner, we hold that as relates to the rights and remedies of creditors, personal property has a *situs* or locality; and is to be governed by the law of the country where it is situated when there arises a conflict between the latter law and the former. The principle of comity cannot require of us that we should enforce on property here, to the prejudice of our citizens, a contract void under our law. It would be giving unjust advantage to foreign creditors over our own, in direct violation of our law. In relation to property within our jurisdiction, we cannot withhold from suitors their legal remedies, or suffer their rights to be controlled or their interests injured by acts of their debtors abroad, not assented to by them, and reprobated by our laws. This would be sacrificing justice to courtesy. 2 *Mart. N. S.* 93; *Story's Conflict*, p. 203; 2 *Kent's Com.*, p. 461." These are the views expressed by this court in *Bierne vs. Patton*, 17 La. 590. They have been maintained and reiterated in many other cases by this court, and have our entire approbation. See 14 An. 845; 3 An. 401; 7 A. 358; 8 N. S. 442; 12 A. 815; 18 L. 450. We therefore hold that the said mortgage did not make Frank & Co. owners of this cotton, so as to defeat the right of attachment here by Heyner's creditors.

Second—But it is said that there was a sale or *dation en paiement* of these ninety-five bales of cotton on the 8th of February, 1877, at Heyner's gin, in Chicot county. It is stated in evidence by Frank and Heyner that on the 8th of February Frank went over to Heyner's gin, and there Heyner exhibited to him the weights of the bales, and showed the cotton to him; that Frank thereupon engaged Heyner to boat the cotton across Lake Chicot, and haul it to Vacluse Landing, and there ship it by the Pargoud. They both swear that they considered this a

sale and transfer to Frank. It is manifest that it was no sale, no *dation en paiement*, even as between the parties.

First—Because, as we have seen, by the terms of the original contract, Frank & Co. were simply to receive *the proceeds* of the cotton, which Heyner was to ship in his *own name*, to a factor of *his own selection* in New Orleans.

Second—Because there was no price fixed or agreed upon for the cotton. Frank himself swears that “the proceeds of the cotton when sold were to be applied as a credit on said indebtedness.”

Third—Because there was no real or actual corporeal delivery, no putting of the thing within the power, control and possession of the transferee, which is indispensable to a *dation en paiement* of movables, even as *between the parties*, C. C. 2656, and equally indispensable to a sale thereof, as against creditors and bona fide purchasers. C. C. 1922.

Intervenors, if there had been an actual delivery, would have only been pledgees, since no price was agreed upon. But they are not before us in other character than as claimants of ownership. They must stand or fall with that pretension. We are satisfied that there was nothing done by the parties on the 8th of February with the intention of changing or modifying the conditions of the original contract, and that there was no sale or giving in payment effected.

Third—The only remaining question for us to consider is, whether the fact of Heyner (the owner of the cotton) shipping it to Chaffe & Sons, for account of Frank & Co., where Chaffe & Sons refused the consignment, had the effect of transferring the ownership to Frank & Co.? This act of Heyner must be interpreted with reference to the original agreement between him and Frank & Co. We have seen that Heyner was to ship in his own name, to his own factor, and that *the proceeds* of the sale were to go to Frank & Co., as a payment on their claims against Heyner. Now a good test of the question of ownership is to enquire on whom the loss would fall in case of destruction of the thing. *Res perit domino*. Had this cotton been lost *in transitu*, who would have borne it—Heyner or Frank & Co.? By what process of reasoning would Heyner have put its loss on Frank & Co.? They would have said to him, by our contract you were to ship this cotton to New Orleans in your own name to your own merchant, and therefore at your own risk. It was *the proceeds of the sale* that we were to get, and you cannot pretend that we ever bought it of you; because by the laws of Louisiana, and in the nature of things, there can be no sale without a price. Now we never agreed upon any price. We told you to send your cotton to New Orleans, sell it and give us the proceeds. The most that can be made of such an agreement is that Heyner shipped his cotton to Chaffe with instructions in the bill of lading to pay the proceeds when sold to

Chaffe & Sons vs. Heyner.

Frank & Co. This did not make Frank & Co. owners of the cotton, and its destruction *in transitu* would have been Heyner's loss. Undoubtedly, had Chaffe & Sons accepted the consignment, they would have been bound to pay the proceeds to Frank & Co., not because Frank & Co. were owners of the cotton, but because Chaffe & Sons had agreed to do so. They would have occupied very much the position of a person into whose hands a thing is given in pledge to be sold to secure and pay a debt due to another. Thus if A put a thing in the hands of B as a pledge, with power of sale, to secure a debt to C, A's creditors could not attach it to the prejudice of C. But this does not make C the owner of the thing or put it at his risk. For if it did, then C would have right to all it brought by sale, however much it exceeded the debt due to him.

In this case before us, suppose Heyner's shipment for account of Frank had been five hundred bales instead of ninety-five—far more than enough to pay Frank & Co. their \$6500—and suppose even that Chaffe & Sons had accepted the consignment, would any court refuse to maintain an attachment of the cotton by Heyner's creditors, subject of course to the payment of Frank's debt by preference? Surely not. And it is only in this sense, and with this limitation, that must be understood, we think, the case of *Grove vs. Brien*, 8 How. 438. If A consign goods to B, "for the use of C," and B accept the consignment, to the extent of C's interest, whatever it may be, he could invoke B's possession as his own, and would be protected to that extent as a quasi owner or pledgee, but no further. The present case differs from that of *Grove vs. Brien* in this important particular, that here the consignee refused the consignment, and never had a possession under the bill of lading which Frank & Co. could plead as a quasi possession of their own.

In the case of *Wilson vs. Smith*, 12 La. 375, *Martin, J.*, as the organ of the court, it was held that where cotton was consigned to a factor to pay an ordinary debt due him by the consignor, the latter remained owner of the cotton, and that it was liable to attachment by his other creditors before delivery; and that in such case the possession of the master of the vessel was that of the consignor. This doctrine has been modified by subsequent legislation, so far as it relates to a consignee who is a creditor of the consignor by advance on the consignment or otherwise. But we apprehend that where the relation of debtor and creditor does not exist, or where the consignee refuses the consignment, that the doctrine is still correct that the possession of the master is that of the consignor. We are satisfied that in this case neither the legal or actual possession of the cotton nor the ownership thereof was ever vested in Frank & Co., and as their claims rest entirely upon their ownership they were properly rejected by the court *à qua*.

Chaffe & Sons vs. Heyner.

It is therefore ordered, adjudged, and decreed that the judgment appealed from, in so far as it rejects the demands of intervenors, be affirmed at their costs. That the judgment of John Chaffe & Sons against defendant Heyner be amended by reducing the amount thereof to the sum of \$3309 65; and that in all other respects it be affirmed; the costs of this appeal as to defendant to be paid by plaintiffs, and as to intervenors by intervenors.

DISSENTING OPINION.

MARR, J. After the most careful consideration, I am unable to concur in the opinion of the majority of the court. The questions involved are of frequent occurrence; and they seriously affect the rights of the citizens of our own State, and of other States, who are peculiarly interested in property which is sent to this market for sale or for other purposes. I am constrained, therefore, to state, at some length, the reasons for my dissent.

On the 29th of March, 1876, Ernest Heyner, a planter, residing in Chicot county, Arkansas, executed, in favor of Frank & Co., merchants, doing business at Sunnyside, in the same county, a mortgage on the crop of cotton to be grown, in the year 1876, on the plantation cultivated by him, and on certain mules and other personal property on the place, to secure what might be due to Frank & Co. on open account for advances and supplies and two promissory notes, bearing ten per cent interest from maturity, one for \$2129 46, which had matured 1st of December, 1875, and was extended to 27th November, 1876, the other for \$2500, to become due 29th November, 1876, touching which last mentioned note it was stipulated that if Heyner should not be able to pay it in full at maturity, on paying half the residue should be extended for one year: and it was further stipulated that Heyner should ship the cotton for account of Frank & Co. to a responsible factor at New Orleans, to be selected by him. This mortgage was acknowledged by Heyner and filed for record on the day of its date; and it was recorded in the proper office in Chicot county.

On the 10th of July, 1876, Heyner executed an instrument in writing which was also acknowledged by him, filed for record, and recorded on the day of its date in the same office, granting a lien and privilege in favor of Chaffe & Sons, factors and commission merchants of New Orleans, on the entire crop of every kind, grown on the same plantation, during the year 1876, to secure advances and supplies for that year, estimated not to exceed \$2000: and he obligated himself to ship to Chaffe & Sons from time to time as it might be ready for market, "all of the cotton I control of the crop of 1876," and to allow two and a half

Chaffe & Sons vs. Heyner.

per cent commission on all sales, purchases, advances, acceptances and endorsements, and interest at eight per cent per annum.

In November, Heyner delivered to Frank & Co., in their store yard, at Sunnyside, fifteen bales of the cotton grown on the plantation, which he requested them to keep until he should have more cotton ready for shipment: and on the 8th of February he delivered to Jacob Frank, of the firm of Frank & Co., at the gin house, on the plantation, ninety-five bales. The road to Sunnyside was then bad: and Frank requested Heyner to have these ninety-five bales "boated" across the lake on which the plantation is situated, to Vacluse, a river landing in the same county. Heyner agreed to do this; and part of the cotton was put on the boats that day, while Frank was present, to be taken to Vacluse. Heyner told Frank that he had cotton to ship for his own account; and that he would ship the ninety-five bales for account of Frank & Co. at the same time. He also told Frank that he wished the whole to be consigned to Chaffe & Sons, in order that they might have the benefit of the commissions; and Frank agreed to this.

The fifteen bales were weighed by Starling, and were designated by the numbers one to fifteen; and the ninety-five bales were weighed by Heyner, and the weights exhibited to and accepted by Frank. They were designated by the numbers sixteen to one hundred and ten.

On the 11th of February, Heyner shipped on the steamer Pargoud at Vacluse, under one bill of lading, consigned to Chaffe & Sons, the ninety-five bales, 16 to 110, expressed in the bill of lading to be for account of Frank & Co., and seventy-six bales, 111 to 186, expressed in the bill of lading to be for account of the shipper, Heyner. A clerk of Frank & Co. testifies that he went on board the boat, knowing of this shipment, and took a copy of the bill of lading: and on the same day Frank & Co. shipped at Sunnyside, on the same boat, the fifteen bales, one to fifteen, for their own account, consigned to Chaffe & Sons.

The Pargoud arrived at New Orleans at an early hour in the morning of the 15th February; and the bills of lading were probably delivered to Chaffe & Sons from eight to ten o'clock. During the morning a bill was presented for something over \$3000, drawn by Frank & Co. on Chaffe & Sons against the 110 bales. It does not appear distinctly whether the attention of Chaffe & Sons had been specially called to the bills of lading before they had knowledge of this bill; nor is it material to inquire. They took legal advice, and refused to honor the bill; and they gave notice to the boat, between twelve and two o'clock, that they would receive and pay freight and charges only on the seventy-six bales shipped by Heyner for his own account. They also gave notice at the press that the 110 bales were not to be received and stored for their account, but for account of the boat, or whom it might concern.

In the meantime, before he knew that there was any trouble about the cotton, the press drayman had hauled off the greater part of it to the press at which cottons consigned to Chaffe & Sons were stored. Chaffe & Sons immediately brought suit against Heyner to recover the amount due them for advances, some \$7000, to be credited with the proceeds of the seventy-six bales when sold; and they attached the 110 bales as the property of Heyner as soon as the last of the lot reached the press.

Heyner answered by general denial; and Frank & Co. intervened, claiming to be the owners of the 110 bales; and they alleged that Chaffe & Sons had accepted the consignments, and could not attach. The fifteen bales shipped at Sunnyside were subsequently released by Chaffe & Sons; and as between themselves and Frank & Co. the controversy is limited to the ninety-five bales shipped at Vacluse. The issues between Chaffe & Sons and Heyner will be first considered.

Heyner's gin house was destroyed by fire; and this caused some delay in getting his crop ready for market. He owed Frank & Co. some \$6500, of which \$5200 were due, the residue having been extended. His crop was short; and the 186 bales shipped on the 11th of February, soon after he had finished ginning and baling, constituted the whole.

Chaffe & Sons sold the seventy-six bales, and carried the proceeds to the credit of Heyner under date of 26th February; and they made up the account to 11th of May, showing balance in their favor \$3480 37, including a draft accepted by them to mature 3d June. The district judge excluded the interest charged and credited subsequently to the 15th February, and thus reduced the balance to \$3420 14, for which he rendered judgment in favor of Chaffe & Sons, with interest at five per cent from judicial demand, 16th February, and lien and privilege on the ninety-five bales attached: and Heyner and Frank & Co. appealed separately from this judgment.

Heyner's counsel complains that there are illegal charges in the account, and that interest up to 16th February should have been calculated at five per cent, because there is no written evidence of an agreement to pay a higher rate. They particularize the commission for advancing and excess of interest, amounting, according to their figures, to \$161 40; and they claim that this amount should be deducted from the \$3480 37, which will make plaintiffs' claim \$3318 96.

The first item in the account is under date of 20th July, ten days after the date and recording in Chicot county of the instrument granting to Chaffe & Sons a lien and privilege on the crop. The account was kept in conformity to that instrument, which was produced and offered in evidence by Chaffe & Sons. Interest was charged at eight per cent on each entry to the debit, and two and a half per cent for accepting

Chaffe & Sons vs. Heyner.

and for advancing. The first account was brought down to the 21st December, and the aggregate of principal, interest and commissions was carried into the second account, which was brought down to the 15th of February. The aggregate of this second account was carried into the third and final account, in which the only credit figures, \$3550 17, proceeds of the seventy-six bales, on which interest at eight per cent is allowed and credited from the 26th February to 11th May, when it closes with the balance \$3480 37 in favor of Chaffe & Sons. These three accounts were signed, as usual; but it does not appear whether or not they were delivered or sent to Heyner.

The mere charging of interest and commissions in an account would not prove an agreement to pay them; but the merchants of New Orleans for years past have charged the highest rate of conventional interest, besides the commission for accepting and for advancing; and where knowing, as all planters who ship their crops to New Orleans for sale must know, that these charges will figure in the accounts, if the debtor promises, in writing, before the account is opened, to allow them, the agreement is perfect. The written promise signed by Heyner was incoherent: it was merely a proposition in support of his application to Chaffe & Sons for advances and supplies; and it was completed and became an agreement by the subsequent acts of Chaffe & Sons. It is written evidence of the fixing of interest at eight per cent, and a commission of two and a half per cent for advancing.

This instrument was not introduced for the purpose of establishing a lien on the cotton, and Chaffe & Sons set up no lien except that which results from the attachment. It may be that so much of this instrument as pertains to the lien and privilege, the security for the debt about to be contracted, would be controlled by the law of Arkansas; but as Chaffe & Sons do not claim any lien under it, it is not necessary to inquire what effect would be given to it by the law of Arkansas. There is no doubt that all the stipulations with respect to the interest and commissions to be charged and allowed fall under the law of Louisiana, the *locus solutionis*; and the effect is to be determined by that law. The law of Arkansas allows conventional interest at ten per cent; and it declares void contracts, obligations, and conveyances in which a higher rate is reserved and agreed upon.

It is well settled in our law that the commission of two and a half per cent for selling and for purchasing, and for accepting, and for endorsing, is lawful. It is a compensation for services and for risk; and it is in no sense additional interest. It is equally well settled that the commission of two and a half per cent for advancing is additional interest; and that it is usurious and cannot be allowed where the highest rate of conventional interest is charged. See *Lalande vs. Breaux*, 5 An. 505.

By the act of 1844, p. 15, re-enacted in 1855, p. 352, and again in Rev. Statutes of 1870, p. 373, sec. 1884, art. 2895 of the Civil Code was amended so as to reduce conventional interest from ten to eight per cent; and a higher rate was prohibited under penalty of forfeiture of the entire interest so contracted. If paid by the debtor he might recover it by suit brought within one year.

It has been supposed by some that the act of 1856, p. 130, allowed the recovery of eight per cent where, in a negotiable note, or written evidence of debt, or obligation to pay money, transferable by assignment, a higher rate was stipulated. In *Crane vs. Beatty*, 15 An. 329, it was decided, after much deliberation, that this act related exclusively to the sale and discount of notes and other written evidences of debt; and that it did not protect the creditor who took the note of his debtor and included usurious interest in the amount for which it was given: and this decision was affirmed in *Campbell vs. Hilliard*, 15 An. 537.

By the act of 1860, p. 41, the owner of a note payable to bearer or to order, or of a written evidence of debt or obligation for the payment of money, transferable by assignment, could recover the whole amount, the face of the instrument, notwithstanding that a greater rate of interest or of discount than eight per cent might have been included in it: "*Provided* such obligations shall not bear more than eight per cent interest per annum after their maturities until paid."

The compilers of the Revised Civil Code have omitted the penalty of forfeiture; but they have retained the right of the debtor to recover usurious interest which he has paid; and they have embodied the acts of 1856 and 1860 as separate clauses of art. 2924, which takes the place of art. 2895 of the Code of 1825. In the Revised Statutes the penalty of forfeiture, and the right of the debtor to recover usurious interest which he has paid, are retained and re-enacted, the first as section 1884, the second as section 1885; while the act of 1856 is omitted; and the act of 1860 is re-enacted, first as section 337, p. 70, and again as section 1889, p. 374.

Fortunately there is no conflict in these several expressions of the legislative will. The Revised Code and Statutes forbid a higher rate of interest than eight per cent; they both authorize the recovery of usurious interest that has been paid; and they both re-enact the act of 1860. The Revised Code alone retains the act of 1856; while the Revised Statutes alone retains the penalty of forfeiture of the entire interest where the rate contracted for is above eight per cent. Of course, that which the Code allows the debtor to sue for and recover if he have paid it, could not be allowed against him at the suit of the creditor if he should set up the defense, and establish it by proof. The courts cannot supply the plea of usury; but where the defendant, sued on an account,

Chaffe & Sons vs. Heyner.

pleads a general denial, and the exhibition of the account, and other evidence in the cause, show that there was an agreement in writing for a higher rate than eight per cent the general issue would suffice.

The act of 1856 did not relate to the owners in general of notes, etc., but was restricted to the purchaser or discount; while the act of 1860 seems, by its terms, to be applicable to any owner, whether one of the original parties or a subsequent holder, by purchase or by discount. Both acts contemplate cases in which the interest to maturity, stipulated at a higher rate than eight per cent is capitalized; and included in the sum for which the note is given, and neither the one nor the other intended to legalize, or to save from the penalty of forfeiture of the entire interest stipulated, any contract by which a higher rate than eight per cent was fixed and expressed in the instrument itself.

This discussion may not be altogether useless, in view of the fact that the idea prevails, to some extent, that one may safely contract for any rate of interest, because, while a higher rate than eight per cent cannot be allowed, the only penalty is the forfeiture of the excess above that rate. The several acts of 1844, 1856, 1860, have passed into the revisions of 1870, with the meaning and effect which they had originally. It is not necessary to express any opinion now as to what their effect would be, as between the original contracting parties, where interest above eight per cent has been included as part of the capital sum, and a note given for the aggregate amount, in the settlement of an ordinary debt. In the case with which we are now dealing the law is positive: the penalty is the forfeiture of the entire interest; and the creditor can recover only the capital sum. There is no reason why the judgment in such case should not bear legal interest from judicial demand, if the debt was then due; or from maturity, if the debt was not then due.

Footing the items we find charged in the account for commissions on advances \$144 01, and interest to 15th February \$146 25, aggregating \$284 26. To this add \$3550 17, proceeds of the seventy-six bales, and we have total credits or deductions \$3834 43. The cash debits are \$6092 31, to which must be added acceptance due 3d March, \$230, and one due 3d June, \$648, making total debits \$6970 31. Deducting total credits as above, \$3834 43, there remains a balance of \$3135 88, for which Chaffe & Sons are entitled to judgment against Heyner, with interest at five per cent on \$2257 88 from the 16th February: like interest on \$230 from the 3d March; and like interest on \$648 from 3d June, 1877, until paid.

It remains now to consider the case as between Chaffe & Sons and Frank & Co. The evidence shows that Chaffe & Sons, within a reasonable time after they received the bills of lading, determined not to accept the consignments of the fifteen bales and the ninety-five bales;

and that they sufficiently declared that determination by the notices to the carrier and at the press. There may be some question as to the effect of the receipt of the cotton on the levee by the drayman; and also as to the right of Chaffe & Sons to accept the consignment in part, and to reject it in part. These questions will be considered in their order.

Cotton factors in New Orleans do not employ the draymen, nor do they pay them. They make their arrangements and contracts with the proprietors of the cotton presses for the receiving, hauling, handling and storing of cottons consigned to them. The proprietors of the presses employ the draymen; and one is designated to haul for each factor storing at the press at which he is employed. On the arrival of a boat at New Orleans the proprietors of the drays, "Boss Draymen," as they are called, or their clerks, go on board and take from the manifest lists of the cottons consigned to factors storing at the presses at which they are, respectively, employed; and as the bales come out and are discharged and separated on the levee, they receive and haul them off. These draymen have no special instructions from the factors, nor do they require any. When the list of a factor is completed, the drayman gives a receipt to the discharging clerk showing the condition of the cotton at the time he received it; and on the faith of this receipt the factor settles with the carrier, and pays the freight and charges as expressed in the bill of lading.

These draymen are not the employees of the factors; and they have no power to bind the factors, except that a delivery to them of the cotton discharged from a boat or vessel would be, as between the carrier and the factor, a delivery to the factor, the consignee. What the drayman did with respect to the cotton in question is precisely what he would have done with respect to any other cotton consigned to Chaffe & Sons, touching which no special instructions had been given to him. It must often happen that an entire consignment to a factor has been received by the drayman and hauled to the press before the factor has examined the bill of lading, or even knows that such a consignment has been made. It was optional with Chaffe & Sons to accept or to reject the consignment; and what the drayman did was without legal consequence as to them.

Much of the cotton that comes to New Orleans, especially that which is not grown immediately on the rivers and shipped at the plantation landings, is hauled to convenient landings, and is there shipped by warehousemen and other shipping agents, according to the instructions of the owners. It frequently happens that such shipping agent has many bales, of different marks, belonging to different persons, all to be consigned to one factor. In such cases it is most convenient, and it is usual, to ship them all under one bill of lading, which begins with the

Chaffe & Sons vs. Heyner.

words "shipped by," etc.; these words indicating simply the person by whom the shipment was actually made, and not the person or persons who own the cotton. As in this case, in one column are the marks and numbers: in another column is a description of the articles, so many bales of cotton, corresponding with the marks and numbers; in another the names of the persons for whose account, respectively, each lot is shipped; and in another, the charges on each lot. In such cases each lot may be regarded as a separate consignment, by each person, for whose account the shipment is made; and practically, there is no difference, so far as the rights of all persons whomsoever are concerned, in such a case and that in which each lot is shipped under a separate bill of lading.

No doubt Heyner would have shipped the ninety-five bales under a special bill of lading, if he had suspected that Chaffe & Sons would reject the consignment, and treat these ninety-five bales as his property. And here a serious question of the law of agency arises. The consignee is the agent of the owner of the property. If he have liens and privileges, by reason of his advances on the special shipment, or for a general balance, this fact in no manner affects his relations to the owner or to the property. He is still the agent of the owner, bound as such to obey his instructions, with the right to retain, as against the owner, for his advances or general balance. If the owner, in making the consignment has appropriated the property, and directed his agent, the factor, to dispose of the proceeds for other purposes than the payment of his general balance, the factor, the agent, must either accept the consignment and obey the instructions of his principal; or reject it, and subject the property by attachment or otherwise, if his rejection and refusal to accept the agency would have the effect of remitting the property into the possession or control of his debtor, the owner.

If this shipment could, by the terms of the bill of lading, be treated as two separate consignments, then there were two consignors, Heyner, who shipped seventy-six bales for his own account, and Frank & Co. for whose account Heyner shipped the ninety-five bales. If the whole be treated as one consignment by Heyner of his property, Chaffe & Sons could not accept the agency with respect to a part only of the property, that which they were instructed to receive for account of Heyner, and reject it as to part of the property, that which they were instructed to receive for account of Frank & Co.; and it is only upon the hypothesis that there were two consignments, by two different consignors, that Chaffe & Co. could have refused the agency with respect to the ninety-five bales, and accepted it for the seventy-six bales. In other words, the ninety-five bales had ceased to be the property of Heyner, and Chaffe & Sons were not his agents with respect to them; or Heyner was

the owner of the ninety-five bales and of the seventy-six bales. If the first hypothesis be true, then as the ninety-five bales were not the property of Heyner, they were not subject to attachment as his property; if the second hypothesis be true, Chaffe & Sons could not attach, because they could not accept the agency and obey the instructions of the principal with respect to a part of his property, and refuse to accept it with respect to the remainder, because the contract would be one and indivisible.

The rights of Frank & Co. are based, primarily, on the mortgage of 29th March, 1876, and the delivery made to them under that mortgage; and the nature and extent of their rights must be tested by the law of Arkansas, the *locus* of the contract of mortgage, the *situs* of the mortgaged property, the domicile of the mortgagor and the mortgagee, the place at which the delivery under the mortgage was made.

The laws of Arkansas were introduced in the court below, the judge says for one purpose, the counsel for Frank & Co., in the motion for a new trial, say for another purpose; and they were referred to by counsel for both parties in this court. It is not material to inquire for what purpose they were introduced; since it is manifest that they were considered and passed upon by the district court. It is our province and our duty to ascertain, if we can, what the law of Arkansas is, and to use and apply it in determining the rights of the parties dependent upon it, without regard to the real or supposed purpose for which it was introduced.

We know that the common law is the basis of the system in Arkansas; and that, in that State, personal property is susceptible of mortgage, as it is in the other States in which the systems are derived from the same source; that there has been some diversity of opinion as to the effect of a mortgage of a crop to be grown, or any other thing not *in esse*; and that the weight of authority is that, although a mortgage or other conveyance of that which does not exist is without effect at the time, it becomes operative and effectual when the thing does exist and becomes the property of the grantor.

Counsel for Frank & Co. refer us to a statute of Arkansas, passed in 1875, which authorizes the mortgage of a future crop; but as a copy of that statute has not been furnished, recurrence must be had to general principles which are applicable in all the States which are designated as common law States.

Under our law, a hope, or expectation, a chance, as the cast of a net, the young of animals not yet born, may be sold. R. C. C. arts. 2450, 2451. These objects may not be mortgaged with us, but that is simply because movable effects are not susceptible of mortgage by our law. R. C. C. art. 3289. That which can be sold and conveyed in Arkansas

and the other States, may be mortgaged; and there is no reason why a thing not *in esse* may not be mortgaged or otherwise conveyed, subject, of course, to the condition that the mortgage or other conveyance will be without effect if the thing should not come into existence as contemplated by the contracting parties.

The decisions of the Supreme Court of the United States are a safe guide for us in determining the general rules regulating rights and property in the other States. In *Pennock vs. Coe*, the question was as to the effect of a mortgage granted by a railroad company on its road not yet built, and locomotives and rolling stock not yet purchased. Judgment creditors, holders of bonds secured by second mortgage, seized under execution, a portion of the rolling stock in actual use on the road, and which had been put upon it before the date of the second mortgage; and the execution was enjoined by the first mortgagee.

Delivering the opinion of the court, Justice Nelson laid down the rule, which cannot be questioned, that a mortgage or other conveyance, *in præsenti*, of that which one has not, or which does not exist, is an impossibility; and that such conveyance would be inoperative and void. But that was not the case before the court. "The case here is, not whether a person can grant *in præsenti* property not belonging to him, and not in existence, but whether the law will permit the grant or conveyance to take effect upon the property when it is brought into existence, and belongs to the grantor, in fulfilment of an express agreement, founded on a good and valuable consideration." 23 Howard, 128.

After reviewing the decisions of the English and American courts, the conclusion is thus stated: "We are satisfied that the mortgage attached to the future acquisitions, as described in it, from the time they come into existence," p. 130: and the decree accordingly maintained the superiority of right of the first mortgagee.

In *Dunham vs. R. Company*, 1 Wallace, 254, the proposition was stated and argued, that "nothing can be mortgaged that is not *in esse*, and that does not, at the time of making the mortgage, belong to the mortgagor," p. 259. The court, maintaining the validity of the mortgage, referred to *Pennock's case*, 23 Howard, "where the rights of the parties depended upon the general rules of law," as conclusive. P. 267.

In *Butt vs. Ellett*, 19 Wallace, 544, the question was between the transferee of a note secured by mortgage on a crop to be grown, and factors in the city of New Orleans, charged with knowledge of the mortgage, to whom the mortgagor was largely indebted for advances, and to whom he shipped the whole crop. This mortgage was granted on the 15th January, 1867, at a time when such a mortgage was not specially authorized, as it has been subsequently, by the laws of the State of Mississippi in which the plantation was situated. The doctrine was

Chaffe & Sons vs. Heyner.

pressed upon the court that the mortgage of a crop not *in esse*, the seeds of which were not yet in the ground, was void. The court decided that "when the crop grew the lien attached. That the cotton went into the hands of Butt & Co., the factors, impressed with this lien, and that when they sold it they took the proceeds in trust for the benefit of the mortgagee, and were liable to him for the amount." P. 547.

It is wholly immaterial, therefore, whether there is a statute of Arkansas specially authorizing the mortgage of a crop to be grown. It is probable part at least of the seeds were in the ground on the 29th of March, when the mortgage was granted. Be this as it may, if the statute authorized the mortgage it would be inoperative, without effect, until and unless a crop was grown. If there was no such statute, the mortgage would be equally inoperative so long as there was no crop; and in either case, the lien would attach when the crop came into existence and grew.

Some stress is laid upon the fact that Frank & Co. do not claim as mortgagees, but as owners of the cotton; and a bill of exceptions was reserved to the ruling of the district court in admitting proof of the mortgage.

This objection rests upon a misapprehension of the relations of the mortgagor and mortgagee, respectively, to the property mortgaged. The legal title is in the mortgagee, by the terms of the mortgage, which is in the usual form, an absolute conveyance with a condition of defeasance; and the mortgagor has only the equity of redemption by paying the mortgage debt. Before the maturity of the debt, in the absence of a stipulation to the contrary, or the manifestation of a different intention by the terms of the mortgage, the mortgagee might sue at law and recover the possession. See *Kennady vs. McCarron*, 18 Arks. 170, citing 4 Kent 154; *Jameson vs. Bovee*, 6 Gill & Johns, 74; *Hartshorne vs. Hubbard*, 2 N. Hamp. 453. See, also, 2 Blackstone, 158.

In *Conard vs. At. Ins. Co.*, 1 Peters, 441, the court treated the proposition "that a mortgage is a conveyance of property, and passes it conditionally to the mortgagee," as too plain to require the support of authority.

In *Gibson vs. Stevens*, 8 Howard, Gibson a merchant of New York, made advances to McQueen on pork and flour in warehouses in Indiana; and McQueen transferred to Gibson the evidences of his title, and gave him orders on the warehouse men, who were the vendors of McQueen, for the delivery of the property. Stevens, sheriff of Allen county, Indiana, had part of the property in possession, under attachment, at the suit of creditors of McQueen, levied after the transfer to Gibson, but before the warehouse men had notice of the transfer. Delivering the opinion of the court, Chief Justice Taney said the legal title was in

Gibson, and McQueen had only an equitable interest in the surplus, if any remained, after satisfying Gibson: and he quoted, approvingly, what Judge Story said, delivering the opinion of the court in *Conard vs. At. Ins. Co., I Peters*: "It is true that in discussions in a court of equity a mortgage is sometimes called a lien for a debt. And so it certainly is; and something more: it is a transfer of the property itself as security for the debt."

Again, at page 401, the Chief Justice said: "It will scarcely be contended that the attaching creditor, or a purchaser under the attachment, or the officer levying it, could maintain an ejectment against the mortgagee in possession, or in any other way interfere with his possession, when holding it as security for money due him. The same rule applies to a mortgagee of personal property, holding the legal title and possession to secure his advances."

In *Holliday vs. Hamilton*, 11 Wallace 561, *Sherwood, Karnes & Co.*, merchants of St. Louis, bought of *Holliday Brothers*, of Cairo, a lot of corn, at a landing between St. Louis and Cairo, for which a steamboat agent gave a bill of lading at St. Louis. *Sherwood, Karnes & Co.*, drew a bill of exchange on *Hamilton & Dunnica* of New Orleans, the consignees; and it was negotiated at St. Louis, and sent forward with the bill of lading, by mail, to the consignees at New Orleans, who accepted and paid the bill. The boat, on her way from St. Louis to New Orleans, took the corn on board. Before she reached Cairo the purchasers, *Sherwood, Karnes & Co.* failed; and when the boat arrived at Cairo, *Holliday Brothers*, the vendors, attached the corn for the unpaid price; and it was unladen from the boat, and sold under the attachment.

Hamilton & Dunnica sued *Holliday Brothers* in trespass, in the U. S. Circuit Court in Illinois; and the case went up to the Supreme Court of the United States.

Delivering the opinion of the court, Justice Davis said: "If *Hamilton & Dunnica* had purchased the corn outright, they could not have got a better legal title to it than they acquired under the admitted facts of this suit. The legal title passed to them to carry out certain designated purposes; and they had the right to the undisturbed possession of it until those purposes were effected." P. 564.

Again he said: "It is argued that the bill of lading did not effect the transfer of the property, because when it was executed the corn had not been received by the transportation company. But it became operative as soon as the corn was in the custody of the boat; and the legal relations of *Hamilton & Dunnica* to the property were fixed from that time." P. 565.

This case fully supports the proposition that, whatever may have been the effect of the mortgage at the time it was executed, because the

crop was not then *in esse*, it became operative when the crop was grown, gathered, and ready for shipment to market. The legal relations of Frank & Co. to the property had certainly become fixed at that time; and this, as the court said in Dunham's case, 1 Wallace, not in virtue of any special statute of the State, but on general principles, applicable to the contract.

A recurrence to the jurisprudence of Arkansas will show that it is in perfect accord with that of the Supreme Court of the United States. In Kennady vs. McCarron, one Norton had mortgaged certain furniture to Kennady. Norton being in default, by failure to pay the debt, Kennady demanded of him delivery of the mortgaged property. Norton pointed it out, in his house, and thus made a delivery. His wife was sick at the time, and Kennady would not disturb her by removing the furniture. McCarron had recovered judgment against Norton, on which he caused execution to issue, under which the furniture in question was seized and sold by the sheriff, and purchased by McCarron; and Kennady brought suit against McCarron to recover the property. The Supreme Court of Arkansas said:

"We think, upon the facts of the case, the plaintiff had the legal title to the property, the immediate right of possession, and good ground of action against the defendant; and that the court below should have so declared the law to be." 18 Arkansas, 171.

In Gilchrist vs. Patterson, 18 Arks. 575, Beardon mortgaged a slave, then personal property by the law of Arkansas, to Norman to secure payment of a note. Norman transferred the note and assigned the mortgage to Rogers; and Rogers to Gilchrist. Beardon sold and delivered the slave to Patterson; and Gilchrist sued Patterson for the slave. The court said:

"On the maturity of the mortgage debt, and default of payment, the mortgagee had, at law, the right of action for possession of the slave against Beardon, the mortgagor, or one holding under him. In equity, the mortgagor had the right of redemption." P. 579.

The court also held that the right of action which accrued to Norman, the mortgagee, vested in Rogers, his transferee, and so in Gilchrist, the plaintiff, by transfer from Rogers.

When Frank & Co. in their petition of intervention claimed to be the owners of the cotton, in this case, they described their relation to the property in the terms used by the Supreme Court of the United States, and the Supreme Court of Arkansas in analogous cases. They ascribed to the mortgage its true legal effect; they called the mortgagee, after default, just what the Supreme Court of Louisiana called him in Dobbin vs. Hewett, 19 An. 513. The legal title was in them by the terms of the mortgage. That title had become absolute by the default of the

mortgagor; and the mortgagor had no longer the right to withhold the property from the mortgagee, as the court said in *Kennady vs. McCarron*. Frank & Co. might have sued Heyner, or any one in possession claiming under him, for the cotton itself, the entire crop. Heyner had simply the equity of redemption, or an equitable right to any surplus that might remain after satisfying the mortgage debt. Heyner could have resisted the suit of Frank & Co. against him for the entire crop only by a bill in equity to compel a sale and an account of the proceeds. There is some question as to whether a bill would lie for the foreclosure of a mortgage of chattels, in possession of the mortgagee, after default; and a resort to such proceeding would be idle where the value of the mortgaged property was not in excess of the mortgage debt, since the effect would be to diminish the realized value to be applied to the debt, to the prejudice and injury of the mortgagee, without the possibility of benefit to the mortgagor. Having the legal title and the possession the mortgagee could sell, and if any surplus remained, he would be accountable for it to the mortgagor.

The Supreme Court of the United States calls the merchant who has advanced on goods placed at his disposal the owner; it calls the transferee of a bill of lading for goods at sea the owner; it calls the consignee who has made advances on the faith of a bill of lading the owner; where the object of the transfer and of the shipment was to secure the debt due to the transferee or consignee. The Supreme Court of Louisiana, in *Dobbins vs. Hewett*, 19 An. 513, calls the mortgagee of a ship, after default, the owner; and the Supreme Court of Arkansas calls the mortgagee of personal property, after the maturity of the debt, the owner. Surely, any other judge or lawyer, dealing with property mortgaged in Arkansas, and in that State delivered to the mortgagee, after the maturity of the debt, may well call him the owner, and maintain his legal title and right of possession on proof of the mortgage and the delivery under it.

The evidence of the delivery to Frank & Co. is complete. When Heyner had finished baling, Frank went to the gin house and demanded the cotton. He wanted a sufficient quantity to pay the mortgage debt, then over due for two months. Fifteen bales had already been delivered and were in the possession of Frank & Co. at Sunnyside; and it was finally agreed that ninety-five bales more should be delivered, which it was supposed would cover the debt, less the part of it which was extended. The weights of these ninety-five bales were exhibited to Frank by Heyner; and the estimation of their sufficiency was based upon the weights. There were then at the gin house 171 bales. The fifteen which had been delivered were numbered one to fifteen. It is manifest that the ninety-five bales were selected and designated by the numbers, as

well as by the weights, and that they were thus separated and distinguished from the seventy-six bales which Heyner, by agreement with Frank, retained for shipment on his own account. This is plain from the fact that the first bale of the lot delivered to Frank at the gin house was numbered sixteen, and the numbers followed, consecutively, up to and including number 110. This was not accidental: it did not happen by chance that the numbering of the 171 bales at the gin house began with the number sixteen to correspond with the numbers one to fifteen already delivered; and that in the ninety-five bales there was not one bale of the numbers 111 to 186. The 110 bales, numbered 1 to 110 inclusive, were thus distinguished from the seventy-six retained by Heyner, 111 to 186; and in the bill of lading the ninety-five bales stated to be shipped for account of Frank & Co. were the consecutive numbers 16 to 110 inclusive, while the seventy-six bales, stated in the same bill of lading to be for account of Heyner, bore the numbers 111 to 186. So that there was not at any time, after the delivery to Frank, any mingling or confounding of the cotton which had thus been, originally, separated and distinguished by weights and numbers.

The delivery to Frank & Co. was as complete as if they had marked the bales, since they accepted them by the numbers and marks put upon them. By the Roman law the delivery was complete by putting the purchaser's mark on the articles sold, where they could not be immediately removed; and the property was thenceforth at his risk. Dig. 18, Tit. 6, l. 14, § 1; and the law of France is the same. Troplong, Vente, 1, No. 103. By our law, "if the obligation be to deliver an object which is particularly specified, it is perfect by the mere consent of the parties." R. C. C. art. 1909.

"The tradition or delivery of movable effects takes place either by their real tradition, or by the delivery of the keys of the buildings in which they are kept; or even by the bare consent of the parties, if the things cannot be transported at the time of the sale." Art. 2478.

There is no system under which the weighing, counting and numbering of articles thus specified and designated, with the intention and consent of one of the parties to transfer and deliver them, and the intention and consent of the other party to receive them, does not operate a change of possession and of title, in accordance with the concurring will and agreement of the parties. The sufficiency of such delivery could not be questioned in Arkansas, where even symbolical delivery is recognized as completely as under our law. *Locke vs. Chapman*, 7 Arks. 197; *Field vs. Simco*, 7 Arks. 269; *Burr vs. Williams*, 23 Arks. 245; *Pickett vs. Reed*, 31 Arks. 131.

It is true that Heyner had possession, rather the custody, of these ninety-five bales after the delivery at the gin house; but this was a

Chaffe & Sons vs. Heyner.

qualified possession, for a specific purpose. By the terms of the mortgage he was to ship the cotton for account of Frank & Co. to a factor in New Orleans to be selected by him. If this stipulation could be construed as giving to Heyner the right and power to sell the mortgaged property, this would have constituted him simply the agent for Frank & Co. Speaking of such a stipulation in a mortgage of goods, Parsons says: "Supposing the whole transaction to be *bona fide*, the mortgagor would be considered as selling the goods as the agent of the mortgagee; and if sold on credit, the debt could not be reached by an attaching creditor of the mortgagor through the trustee process," that is by garnishment. Contracts, vol. 1, p. 570.

Both parties understood that Heyner should have the possession of the crop up to the maturity of the debt; and before that time he was to have the right to ship it, not for his own account, but for account of Frank & Co.; and the object was to provide funds by sale of the mortgaged property to pay the mortgage debt at maturity. The maturity of the debt was at the end of November, when, ordinarily, the greater part of the crop would have been shipped to market. When the debt had matured, and no part of it had been paid, and no part of the crop had been shipped to market, Heyner was in default; and he no longer had the right to claim the benefit of the conditions of the mortgage, nor to withhold the possession from Frank & Co., as the Supreme Court of Arkansas decided in Kennady vs. McCarron. Six months had elapsed since the beginning of the cotton picking, and more than two months since the maturity of the mortgage debt; and by his own default Heyner had lost the right to insist on the stipulations in his favor in the condition of defeasance. He and Frank both understood this perfectly; and when Frank went to the gin house, on the 8th of February, and demanded delivery, Heyner promptly consented, and did deliver the ninety-five bales, which he and Frank supposed would suffice, with the fifteen bales previously delivered, to pay all the mortgage debt except that part of it which they agreed should be extended.

The mortgage conveyed the legal title to Frank & Co.: the maturity of the debt and the default of payment entitled them to the immediate possession: the delivery by the marks, numbers, and weights gave them actual possession; and from that moment Heyner ceased to have the legal right or power to control, in any manner, the subsequent disposition of the property by them.

By the terms of the mortgage, the entire crop was to be shipped by Heyner, for account of Frank & Co.; but after default, after the condition had become absolute, the contract rights of the parties were modified by their consent. Only ninety-five bales of the whole crop were to be shipped by Heyner for account of Frank & Co.; and Heyner

was to have the uncontrolled disposition of the remaining seventy-six bales for his own account. He desired to ship the whole crop to Chaffe & Sons, that they might have the benefit of the commissions; and he undertook to transport the ninety-five bales to Vacluse Landing, and to ship them for account of Frank & Co. He was simply the agent for Frank & Co. for the special purpose of shipping the cotton; and that, not because it was so stipulated in the contract of mortgage, his part of which he had failed to perform, but because, after the delivery at the gin house, Frank consented to this arrangement, at the request of Heyner.

It is not unusual to stipulate, in mortgages and deeds of trust, that the property shall be sold without the intervention of justice, in the manner agreed upon; and our law permits this in the contract of pledge. R. C. C., art. 3165. Although by the delivery at the gin house, Heyner had lost the right to interfere, in any manner, with Frank & Co. in the subsequent disposition of the cotton: although the legal title, the right of possession and the actual possession were in Frank & Co., yet Heyner had an equitable right to any surplus that might remain after the satisfaction of the mortgage debt; and therefore it was to his interest that the cotton should be sold to the best advantage. Frank & Co. acceded to his reasonable request; and the fifteen bales at Sunnyside were shipped, not by Heyner, but by Frank & Co. for their own account, and the ninety-five bales at Vacluse were shipped by Heyner for account of Frank & Co. on the same day, by the same boat, consigned to the same factors, Chaffe & Sons. The conduct of both parties was, in all respects fair, reasonable, just and lawful, and in accordance with their respective rights and interests.

When the cotton was delivered to the carrier, and a bill of lading was signed, consigning the ninety-five bales to Chaffe & Sons "for account of Frank & Co.," the carrier became the bailee and agent of Frank & Co. for the special purpose of transportation, safe custody, and delivery, as consigned; and the relations of Frank & Co. as holders of the legal title, having the right of possession and actual possession, were in no manner changed. If Chaffe & Sons had accepted the consignment, they would have been bound to receive and sell the cotton as the property of Frank & Co. and to account to Frank & Co. for the proceeds; and when they refused to accept the consignment, they simply declined to become parties to the contract of affreightment, and agents for Frank & Co.; and they chose to be strangers to the bill of lading. The effect of this was not to impair in any respect the title and right of Frank & Co.; and the right of possession remained in the carrier, as bailee and agent of Frank & Co.

The case of *Grove vs. Brien*, 8 Howard, 429, would have been almost

Chaffe & Sons vs. Heyner.

identical with this, in fact, as it is in principle, if Chaffe & Sons had received and sold the ninety-five bales under the bill of lading and consignment. Brien was the proprietor of a foundry, near the Potomac, in Maryland; and he was indebted to Gilmor, of Baltimore, and to Grove and to Foule & Sons of Alexandria. He had been in the habit of shipping nails to Foule & Sons; and his indebtedness to them grew out of these transactions. He wrote them in February promising an early shipment of nails ordered by them. In March he shipped 500 kegs, taking receipt or bill of lading as follows:

"Received, March 14, 1843, of John McP. Brien, 500 kegs of nails, to be delivered to William Foule & Sons, Alexandria, D. C., for the use of Robert Gilmor, Esq., Baltimore, in good order."

As soon as the nails arrived Grove attached them in the hands of Foule & Sons. Gilmor became a party by leave of court; and he set up his right under the shipment, which was made on account of the indebtedness of Brien to him. Foule & Sons sold the nails in the usual course of business; and they claimed a lien on the net proceeds in their hands for the balance due them on previous dealing. The court decreed that Brien had no property in the hands of Foule & Sons subject to attachment; that Foule & Sons had no lien for the general balance due them; and that Gilmor was entitled to the net proceeds of the sales of the 500 kegs. On appeal, the Supreme Court of the United States affirmed this decree. Nelson, judge, delivering the opinion of the court, said, p. 438: "The delivery of the goods by Brien to the master, and the bill of lading taken in the name of Gilmor, for the purpose of securing to him an existing indebtedness, operated as a transfer of the legal title; and the shipment, therefore, was not only in fact, but in judgment of law for and on his account. Gilmor was the consignor. The effect of a consignment of goods, generally, is to vest the property in the consignee; but if the bill of lading is special, to deliver the goods to A for the use of B, the property vests in B." See *Evans vs. Marlett*, 1 Lord Raymond, 271; *Sargent vs. Morris*, 5 Eng. C. L. R., 283, cited by the court, and *Lawrence vs. Minturn*, 17 Howard, 107; *Story on Agency*, section 395.

And again, p. 439: "The 500 kegs of nails in the hands of Foule & Sons, were not subject to attachment for the liabilities of Brien, as the title to the property had already passed to the defendant Gilmor; and Foule & Sons had no valid lien on them as consignees, for previous advances to Brien; as they were the agents to receive the goods on commission for sale, and were advised by the bill of lading and correspondence that they were shipped for and on account of Gilmor. Though the goods were delivered by Brien to the master for consignment, they were delivered as the property of Gilmor, and under circumstances, as we have seen, that had the effect to invest him with the title." P. 439.

By refusing to accept the consignment, Chaffe & Sons had the same rights, precisely, that any other creditor of Heyner had, and no more, with respect to this cotton. If there could have been any defect in the delivery to Frank & Co. at the gin house, the shipment by Heyner for account of Frank & Co., as was decided in *Grove vs. Brien*, and as Judge Story says in his work on Agency, section 395, vested the legal title in Frank & Co.; and that title was not dependent on any act of Chaffe & Sons. Their acceptance of the consignment would have compelled them to account to Frank & Co. for the proceeds; their refusal to accept did not divest the right and title of Frank & Co. The cotton had passed from the dominion and control of Heyner before it came within the territorial limits of the State of Louisiana; and the law of Louisiana begins to act upon property only when it comes into the State.

There is proof in the record that Chaffe & Sons knew of the relations between Heyner and Frank & Co. before they made any advances to Heyner. John Chaffe says he did not know of any recorded rights against Heyner's property; but it was proven that the contract of 10th July was exhibited to Chaffe & Sons before they made advances; and it is marked on its face "Second Lien," which was sufficient to charge them with notice of a prior lien on the crop. According to the decision of the Supreme Court of the United States, in *Butt vs. Ellett*, 19 Wallace, this would have made them trustees of Frank & Co., and liable for the proceeds up to the amount of the mortgage debt, if Heyner had shipped the whole of the cotton to them, without mentioning in the bill of lading that ninety-five bales were for account of Frank & Co.

It is well established in our law, it must be the law every where, that where the owner of property has lost his control over it, and cannot change its destination, his creditors cannot attach it; and it is obvious that Heyner could not at any time after the delivery at the gin house, or the signing of the bill of lading, without gross wrong, if not crime, have changed the destination of the ninety-five bales of cotton; or have conferred upon any person whomsoever any right or title adverse to that of Frank & Co. See *Truften's case*, 12 Martin; 4 N. S. 667; 7 N. S. 139, and other cases cited; 1 Hennen, p. 135, No. 2.

Undue importance is attached to the question as to whether this cotton was at the risk of Heyner or of Frank & Co. The legal title, the right of possession and actual possession may be perfect; and yet may be entirely separate and distinct from the risk. In *Conard's case*, 1 Peters, if the goods at sea had perished, the loss would have fallen on the person who transferred the bill of lading as security for debt; and yet Judge Story, the organ of the court, said the transferee was the owner. In *Gibson vs. Stevens*, if the pork and flour had been destroyed in the warehouses, the loss would have fallen on McQueen, to whom

Gibson made the advances; and yet Chief Justice Taney, the organ of the court, said Gibson was the owner, and could not be disturbed in his right of possession by attaching creditors. In *Grove vs. Brien*, if the nails had been sunk in the Potomac, the loss would have fallen on Brien; but Judge Nelson, the organ of the court, called Gilmor, for whose use Brien shipped them, the owner; and in *Holliday vs. Dunnica*, if the corn had been lost on the voyage, the loss would have fallen on Sherwood, Karnes & Co.; and yet Judge Davis, the organ of the court, did not hesitate to call Hamilton & Dunnica, the consignees, who had made advances on the faith of the bill of lading, the owners; and to say that if Hamilton & Dunnica had bought the corn outright they could not have acquired a better legal title.

It is obvious that where goods are transferred as "security" for a debt, not "in payment," the risk is with the transferrer; and the legal title is in the transferee. If the goods be lost, without fault on the part of the transferee, the mortgagee, the pledgee, the debt can not be paid out of the proceeds; and the transferrer remains indebted as he was *ab origine*.

In *Hepp vs. Glover*, 15 La., this court declared, as all other courts in the United States hold, that the attaching creditor can acquire no greater rights to the property attached than the debtor himself has; and in *DeLoach vs. Jones*, 18 La., where cotton, pledged to a bank as security for a debt in Arkansas, was shipped by the agent of the bank to this market, the court held that the right and title acquired under the law of Arkansas, before the cotton left the State of Arkansas, must be respected and enforced in Louisiana.

If our laws and our courts do not respect and enforce rights acquired in other States, between the citizens of those States, with respect to property in those States, which comes within the territorial limits of Louisiana only when it is impressed with such rights by the *lex loci domicilii et contractus, et rei sitae*, those having property, either holding as owners absolutely, or as security for debt, will hesitate to place it within our territorial limits, unless they know enough of our law to be assured that the title is one which our law would consider perfect with respect to property which had never been beyond the limits of Louisiana.

In *Wilson vs. Lizardi*, 15 La. 255, a debtor placed drafts for collection in the hands of his factors in New Orleans, with instructions to remit the proceeds to his creditors in London. Plainly neither the title nor the possession, nor the right of possession, passed to the London creditors; and the drafts and the proceeds in the hands of the factors, the agents of the debtor, were subject to attachment at the suit of his other creditors.

In *Beirne vs. Patton*, 17 La. 589, cotton, and tobacco in the hands of New Orleans factors, belonging to a citizen of Tennessee, were conveyed by him, in the State of Tennessee, to other citizens of Tennessee, in trust for the benefit of other citizens of Tennessee, his creditors, some of whom were to be paid by preference out of the proceeds. The factors had notice, and agreed to hold subject to the order of the assignees, or trustees. *Beirne* attached, subsequently, in the hands of the factors; and the trustees intervened, and claimed to be put in possession under the deed. This court held that the deed of trust would be void under our law, as made in fraud of creditors; "and there is no legal evidence that it would be valid under the laws of Tennessee."

The court recognized the principle that all contracts in regard to personal property must be regulated by the *lex loci domicilii* of the owner. But this property came to Louisiana impressed with no other rights than those of the owner. Insolvent, while the property was in Louisiana, in the hands of his agents, for sale for his account, he made a transfer, not to any creditor, but to trustees for the benefit of his creditors, establishing a preference among them which was fraudulent and void by our law, and not shown to be valid by the *lex domicilii*. Of course there can be no question that the property was subject to attachment at the suit of a Louisiana creditor. The court properly held that the trustees acquired no beneficial title in themselves, and might well be viewed as the agents of the insolvent debtor to distribute the property according to his instructions.

In *Hughes vs. Klingender*, 14 An. 52, a British ship was conveyed in England to a trustee for the purpose of securing a debt to the Bank of Liverpool. She came to New Orleans in the possession of the grantor, the owner; and was attached by his creditors. The agent of the bank intervened, and claimed the right to bond the ship. The court held that the bank was not the owner: that the deed of trust could only give the bank a privilege; and that, as creditor and intervenor, the bank had not the right to bond, which belonged only to the *defendant*, or the owner, in an attachment suit.

In the same case, on its merits, the court said: "The instrument offered in evidence, the conveyance to the trustee, has no analogy to any mode known to our law of affecting personal property for the security of debts. It purports to sell to one man, to protect the rights of a third person; and yet the vendor is to retain possession. The contract is not a sale, nor a pledge; for there is no delivery, which our law deems essential in order to perfect either contract as to third persons. As our law would not enforce a similar contract between our own citizens, if made here, it will not enforce it to defeat rights already acquired by the attachment under our own laws." 14 An. 845.

In *Southern Bank vs. Wood*, 14 An. 554, two ships at sea were conveyed, sold, by the owners living in the city of New York, to Wood & Champlin, of the same place, in trust to sell them, and to pay the proceeds to creditors: and regular bills of sale, conveying the title to the trustees, were executed.

The vessels were then on their way from Havre to New Orleans. On the arrival of one of them, the agent of the trustees, holders of the legal title, took possession; and when the other arrived, he gave notice to the master to give him possession under the title. Both vessels were attached by the bank as the property of the former New York owners, one of them after the agent had taken possession, the other before he had taken possession, having been attached in the river, before she reached the port. The court said:

"The assignment and sales of these vessels did not, and could not, conflict with our laws, because the vessels and the parties to these deeds were not within the dominion of the State when they were executed and the transfer took place; and the parties to the acts were citizens of New York, where such acts are lawful. P. 556.

"Before the vessels arrived at New Orleans, and were attached, a perfect title existed in the trustees for the benefit of the preferred creditors; so that no conflict could arise between the laws of Louisiana and those of New York."

Of course the title of the trustees, intervenors, was maintained.

In *Fall vs. Darden*, 17 An. 236, Darden, a citizen of Tennessee, in that State sold a stock of goods to Hicks, also of that State. At the time of this sale part of the goods were at sea, *in transitu*, from Liverpool to New Orleans. Immediately on the arrival of the ship at New Orleans, before the agent of the vendees could get possession, plaintiff a resident of this State, a creditor of Darden, attached the goods as his property. Hicks intervened, claimed the goods, and recovered judgment for them. Affirming the judgment this court said:

"By the laws of Tennessee, as proven, a sale of property without delivery is valid against the vendor's creditors. * * * Had the goods been in this State at the time of the sale, an attachment of them would have been sustained, there being no delivery. * * * But the goods not being within this State at the time of the sale, our laws had no control over them; and their subsequent removal here cannot change acquired rights. The contract was complete by the laws of Tennessee; * * * and the *lex loci contractus* must govern."

In *Dobbin vs. Hewett*, 19 An. 513, Hewett of Maine had mortgaged a ship to McLoan of the same State. She came to New Orleans and was attached as the property of Hewett. McLoan, the mortgagee, intervened; and proved that by the law of Maine, after default of pay-

Chaffe & Sons vs. Heyner.

ment of the mortgage debt, at maturity, the mortgagee of ships or other personal property becomes absolute owner, without delivery, subject to the right of the mortgagor to redeem within sixty days. As the debt had matured, and was not paid before attachment, this court held that the title of the interyenor, the mortgagee, had become perfect by the law of Maine before the ship was attached; and that it must prevail.

These three decisions are in perfect accord with the jurisprudence of the Supreme Court of the United States, of the State of Arkansas, and of the other States of the Union generally. In my opinion they rest upon principles which are too well established to be now questioned; and which are sound and wholesome; and I consider them determinative of the controversy in this case. I think the judgment of the district court should be amended as to the amount decreed against Heyner: that it should be reversed as to the intervenors Frank & Co.; and that we should declare and decree that the ninety-five bales of cotton were not subject to attachment at the suit of creditors of Heyner.

DEBLANC, J. I concur in the foregoing opinion.

ON REHEARING.

WHITE, J. The facts of this cause have been so fully stated in the opinions hitherto expressed, that there is no necessity either to restate or even recapitulate them.

Between plaintiffs and defendant we see no reason to change our former conclusion, which has not been questioned in either the oral or printed arguments submitted on the rehearing, wherein the entire discussion at bar restricted itself to the issue between the plaintiffs and intervenors. Upon that issue we have concluded that our original decree was erroneous, and that the claim of intervenors should be maintained.

First—Because we consider that the cotton was duly delivered at the gin house.

Second—Because we think the shipment was a delivery. How was that shipment made? By "Heyner to Chaffe & Co. for account of Frank & Co." What was the effect of that shipment thus made as between Heyner, Frank & Co. and the carrier? It was to make Frank & Co. the consignors, to place the cotton in the hands of the common carrier for them, and if lost, under the rule of *res perit domino*, the loss would have been that of the consignor. That such is the effect of such a shipment was long since determined by the Supreme Court of the United States in *Grove vs. Brien*, 8th Howard, 429. The facts, as stated

in that case, in the opinion of the court, which was pronounced by Mr. Justice Nelson, were as follows :

"Brien being indebted to Gilmor, on the 14th of March, 1843, shipped to Foule & Sons 500 kegs of nails, the property in question, for the purpose of securing such indebtedness, and took from the master of the boat the following receipt or bill of lading:

"Received, March 14, 1843, of J. McP. Brien, 500 kegs of nails, to be delivered to W. Foule & Sons, Alexandria, D. C., for the use of Robert Gilmor, Esq., Baltimore, in good order."

In commenting on these facts, strictly analogous to those before us, the court said: "The delivery of the goods by Brien to the master, and the bill of lading taken in the name of Gilmor for the purpose of securing to him an existing indebtedness, operated as a transfer of the legal title; and the shipment therefore was not only in point of fact, but in judgment of law for and on his account. Gilmor was the consignor. The effect of a consignment of goods generally is to vest the property in the consignee; but if the bill of lading is special to deliver the goods to A for the use of B, the property vests in B, and the action must be brought in his name in case of loss or damage."

No authority has been produced even questioning the correctness of this case, and we think it properly enunciates the now settled commercial law on the subject.

It is said that the case at bar differs from *Grove vs. Brien*, inasmuch as in the latter the consignees had accepted the consignment. An examination of the briefs of counsel in *Grove vs. Brien* indicates that the main dispute was as to whether Gilmor, the consignor, had consented to the shipment of the goods in his name. We cannot understand how the acceptance or non-acceptance by a consignee can be held as destroying the title of the consignor to goods consigned; such acceptance may or may not invest the consignee with the consignor's title so as to prevent the creditors of the latter from levying on the property as yet belonging to the consignor, but this is an entirely different proposition from that which would enunciate the doctrine, that where A consigned goods to B as consignee, the mere refusal of B to accept the consignment destroyed the consignor's title to the property consigned. To sanction such a theory would be destructive of all the law merchant, as applied to bills of lading, and place every consignor completely at the mercy of the person to whom he consigned his goods.

Third—Even if we were to depart from the settled rule of commercial law, on the subject of bills of lading, and treat Heyner as the consignor, although the shipment was made for account of Frank & Co., our conclusion would be the same, for then the shipment would become one shipment, and the plaintiffs would be bound by the terms of the

bill of lading, which they have accepted by the delivery and acceptance of the seventy-six bales for account of shipper. Either the bill of lading was separate or it was not. If separate then as to the ninety-five bales it was for account of Frank & Co., and the ninety-five bales were theirs. If not separate then it could not be divided so as to enable the plaintiffs to accept a part and reject the remainder.

It is therefore ordered that as regards the defendant, our former decree remain undisturbed; that as regards the intervenors our former decree be set aside; and it is further ordered that the judgment below rejecting the demand of intervenors be and the same is hereby reversed; and proceeding to render such judgment as should have been rendered below, it is ordered that the intervention of Frank & Co. be maintained, and they be decreed to be the owners of the ninety-five bales of cotton in controversy, with costs in favor of the intervenors in both courts.

MARR, J. I concur in the foregoing decree, but I do not think the maxim *res perit domino* is applicable, nor in my opinion is it necessary to inquire whether if the cotton had been destroyed, *in transitu*, the loss would have fallen on Frank & Co.

DISSENTING OPINION.

SPENCER, J. I adhere to the views expressed by me in the former opinion of this court.

The fundamental errors of the opinion now rendered by the court consists—

First—In holding that there was ever any real and actual delivery to Frank by Heyner at the gin in Arkansas. The written contract between these parties, offered in evidence by intervenors themselves, and which is the very basis of their claims, shows that no delivery was ever contemplated or to be made.

Second—In holding that the ninety-five bales of cotton, while *in transitu*, were at the risk of Frank & Co. who had never agreed or promised to give any certain sum or price whatever; but had simply agreed that Heyner should sell the cotton through his merchants in New Orleans and give Frank & Co. the proceeds, the amount to be credited to Heyner's indebtedness to them. Unless there is a special agreement to the contrary, the risk is always on the owners of the thing. To my mind it is patent that Frank & Co. had not the risk of this cotton *in transitu*, and as no special agreement is shown on the subject, they are thereby demonstrated not to be owners. The case referred to, of Grove

Chaffe & Sons vs. Heyner.

vs. Brien, is not shown to be in point, for the reason that it may have been shown in that case that Gilmor, the person for whose use the ship-ment had been made, had fixed and agreed upon a price, which cannot be pretended in the present case.

I deny that Frank & Co. were the consignors. Heyner was the con-signor. I therefore dissent.

No. 6943.

IN THE MATTER OF THE MECHANICS' SOCIETY.

The Act of the Legislature of 1877 reviving the charter of the New Orleans Mechan-ics' Society operated as a waiver, on the part of the State, of all penalties incurred by the society on account of their having failed to comply with the conditions imposed on them by their charter of incorporation, and estops the State from claiming an enforcement of those penalties.

Where an act of transfer expressly conveys the occupancy and possession "*for-ever*," not the mere usufruct, but the full ownership of the property is thereby passed.

The court may on its own motion appoint a liquidator, or receiver of a corpora-tion, where its charter makes no provision for its liquidation, and the neces-sity for its liquidation shall arise.

A corporation authorized to sell its property is in general authorized to mortgage it.

The New Orleans Mechanics' Society was authorized to mortgage its property to raise the means necessary to make the repairs required by the joint resolution of the Legislature of 1867, and the holders of the mortgage may sell the prop-erty to satisfy their debt, but the purchaser of the property must take it subject to the same liability of forfeiture to the State it was under while owned by the society.

A PPEAL from the Third District Court, parish of Orleans. *Monroe, J.*

H. N. Ogden, Attorney General, *J. C. Egan*, Assistant Attorney Gen-eral, and *T. C. Flanigan* for the State, appellant.

Chas. E. Schmidt, *T. J. Semmes*, *Gibson & Gibson*, *J. W. Thomas* and *A. C. Lewis* for defendant and appellee.

A. Voorhies for intervenor.

The opinion of the court was delivered on the original hearing by DEBLANC, J., and on the rehearing by SPENCER, J.

DEBLANC, J. In 1821, the Legislature of the State incorporated— for charitable purposes and the promotion of mechanical arts—the New Orleans Mechanics' Society, whose existence was then limited to twenty years, and—thereafter—extended to the 17th of February, 1871.

In 1850—by an act approved on the 21st of March, the Governor of the State was authorized and directed to transfer and deliver, and he

did transfer and deliver to the New Orleans Mechanics' Society, *the possession and occupancy, for ever*, of a lot of ground situated in this city and belonging to the State.

By sec. 3 of said Act, it was provided: "That the said Mechanics' society shall immediately after the execution of the donation, begin, and within three years thereafter, complete the construction of a brick or stone building on said ground, suitable for a library, lecture room, and cabinet of natural history and mechanical inventions, and the said Society shall, as soon as said building is completed, establish and maintain a library for the use of the mechanics of New Orleans, and an annual course of lectures on the physical sciences and particularly those connected with agriculture and the mechanical arts."

And by sec. 4: "That if the said Mechanics' Society shall fail to do and perform any of the acts required of it by the second section of this act, then the land of which they are hereby given the possession and occupancy, shall be taken possession of by the Governor on behalf of the State, and all the buildings or improvements made thereon, shall be forfeited for the use of the State."

In 1857, a building which—in obedience to one of the conditions of the act of 1850, had been, by the society, erected on the ground thus transferred by the State, was destroyed by fire, and the Legislature appropriated the sum of ten thousand dollars, to aid the society in rebuilding its destroyed edifice, on the conditions imposed by the Legislative act. When the war broke out between the American States, that edifice—known as the Mechanics' Institute—had not been completed.

In 1867, the State, or—as contended by its counsel—the State officials, who—before that date—had leased the Institute, procured an extension of the term of said lease; and—by a joint resolution of the Legislature—the owners of the Institute *were required* to have it properly finished for the first day of the month of November of that year. To again assist them in so doing, an additional appropriation of fifteen thousand dollars was placed at their disposition.

These appropriations not being sufficient, the society, *in order to comply with the joint resolution* already referred to, negotiated three of its own notes, secured by a conventional mortgage on two lots of ground, that transferred to it by the State, another purchased from Samuel Locke, and the buildings thereon erected. These notes were negotiated to A. Rochereau & Co. and the Factors' and Traders' Insurance Association. They advanced the money needed by the Mechanics' Society, and—according to the evidence—the money so advanced *was used for exclusively* the completion of the unfinished edifice.

On the 17th of February, 1871, the charter of the Society expired. As the charter was silent as to the mode of the liquidation of its affairs,

its creditors—who admit its undenied solvency—applied to the late Superior District Court to appoint a liquidator to take charge of, and settle its affairs. Their application was granted, and the court's appointee authorized to sell the Society's property to pay its debts.

On the 10th and 16th of February, 1876, the holders of the three negotiated notes brought suit against the liquidator, for the recognition and enforcement of the mortgage securing the payment of their claim. To their demand, he opposed the plea of prescription. As—however—by the effect of a payment of interest, that of the notes had been—by mutual consent of the debtor and creditors—extended until the expiration of the charter, on the 17th of February, 1871, prescription—though apparently in sight—had not been acquired, when—on the 16th of February, 1876, the creditors' citations were served on the liquidator. His exception was properly overruled, and—on the 5th of June—they obtained judgment for the amount of their respective claims, with recognition of their mortgage.

On the 14th of November, the court ordered the sale of the mortgaged property, and—between the date of that order and the sheriff's advertisement of the sale so ordered, the very same property which—it is urged—has not ceased to belong to the State, was—nevertheless—seized and advertised for sale, to satisfy the taxes thereon levied by the State, and which then—with the costs incurred—amounted to three thousand three hundred and twenty-eight dollars and thirty five cents.

To protect their rights, the creditors were compelled to pay those taxes, and—this done—the sheriff proceeded to advertise the sale ordered by the Superior District Court; but the creditors had hardly made the peremptorily exacted payment of State taxes, and thus removed what they considered as the only obstacle to the exercise of their rights, than a suit was instituted—in conformity to a concurrent resolution of the Legislature of 1875—to forfeit to the State the mortgaged property, and enjoin its sale under the order of the 14th of November. The reasons alleged to obtain the forfeiture are, that the Mechanics' Society has failed:

First—To maintain a library for the use and benefit of the mechanics of New Orleans and of the citizens of Louisiana.

Second—To maintain a course of lectures on the physical sciences, and particularly those connected with agriculture and the mechanical arts.

Third—To keep the building erected by the aid of the money appropriated by Act No. 126 of 1857 “constantly insured to the largest amount possible,” as required and contemplated by said Act.

To the action filed in behalf of the State, the creditors excepted on eight different grounds, one of which is that, “by act of the Legislature,

promulgated on or about the 15th March, 1877, the State has revived the charter of the New Orleans Mechanics' Society for a term of fifty years, and has specially recognized its rights to the property claimed in this suit, and has enlarged the franchises and privileges of the society, and left it untrammelled with any particular conditions as to the use of the property herein claimed, and has, by said Act, waived and abandoned the right, if any it ever had, to claim the rescission of any of the aforesaid donations or the forfeiture of any property of said Society, and there is no authority, if any ever existed, for the prosecution of this suit."

We concur in the assertion that—prior to the expiration of its charter—the Mechanics' Society did not comply with all of the conditions attached to the State donations: we do more—we admit that the society did itself violate, and that—at the suggestion and with the assistance of those who then represented the State, it again violated some of the conditions imposed upon it by the laws invoked to forfeit its charter and confiscate its property; but can we disregard the fact that—as to the most important of the several violations now urged against it—its avowed accomplice was a sovereign State? That accomplice would not be allowed—if it so intended—to take advantage of a wrong, in the perpetration of which the largest share should have to be charged to its own credit. The State has—however—undoubtedly excused and expressly waived the forfeiture which—to no inconsiderable extent, was incurred at the instigation of its mandataries.

The act promulgated in 1877 may be—as contended—of doubtful parentage: it may be that it was, through the door of fraud, that it stole its admission in the statute book—but it is there, and—since its admission—two Legislatures have met and adjourned, without even attempting to repeal it. Their failure to do so amounts to its ratification, and—were it a legislative bastard—it is now too late to contest its legitimacy. That act, which revived for fifty years the expired charter of the society, was passed—not with only a simple notice of the causes which might have justified the forfeiture sought to be obtained, but with notice that a suit was pending—at the date of its adoption—to enforce the rights which, it is alleged, have reverted to the State, on account of said forfeiture. Under these circumstances, the adoption of the act promulgated in 1877 operated—it is evident—as a waiver of any incurred penalty.

16 Serg. 140—1 Pa. 426—9 Wend. 351—2 Pa. 546—Abbott's Dig. of Corp., No. 54, pp. 354 and 355.

That act is not unconstitutional: its title expresses its objects—it impairs no obligation, divests no vested right: it neither revives nor amends—by reference to its title—any repealed or existing law, nor has

In the matter of the Mechanics' Society.

it a single one of the characteristics of the *ex post facto* or retroactive legislation prohibited by the constitution. It injuriously affects no one, invades no right, and is not within the prohibition.

2 Pet. 380—8 Pet. 88—11 Pet. 420—10 H. 395—17 H. 456—2 Pa. 74—4 Wall. 172.

The State alone was interested in the enforcement of the forfeiture of the society's charter, and—in advance of any decree declaring that forfeiture—the Representatives of the State have—in the exercise of the powers delegated to them—renounced, in its name, to any and every right which it might have acquired under the expected decree. Can the courts of the State ignore that legislative renunciation, and *destroy*—in obedience to the concurrent resolution of 1875—the charter which, in 1877, *was revived* for half a century? Most assuredly not. The act adopted in 1876 and promulgated in 1877 is more than an ordinary estoppel: it is the published evidence of an absolute abandonment—by the State—of the action filed in its behalf against the New Orleans Mechanics' Society.

Did the society acquire—by the donation from the State—the unqualified and perfect ownership of the lot of ground on which its institute is partly built?

Acting under the authority of an act of the Legislature, the Governor of the State transferred to the society, and *FOREVER*, the possession and occupancy of said lot. These terms, as to the property donated—transferred a right by which it was to be perpetually held by the donee, and so held to the perpetual exclusion of all others, not excepting the State.

In *Arnauld vs. Delachaise*, this court—adopting the views of eminent commentators on the civil law, said with them: "that perpetuity is contrary to the very essence of usufruct, and if the entire enjoyment of an estate has been expressly bequeathed in perpetuity to a community, the right thus bequeathed would have only the name of usufruct, and the property itself would pass by that description."

"On voit—as remarked by Moulon—combien serait restreinte l'utilité de la propriété, si elle était à *perpétuité* dépourvue de ses attributs essentiels, le *jus utendi* et le *jus fruendi*. Dans la plupart des cas, son utilité serait absolument nulle pour celui qui en serait nanti. Son effet se bornerait à gêner l'usufruitier dans ses projets d'amélioration sur la chose. Il est donc de l'essence de la propriété qu'elle ne soit point perpétuellement réduite au *jus abutendi*, et, réciproquement, de l'essence de l'usufruit d'être *temporaire*."

Moulon, *Examen du C. N.* vol. 1, p. 720.

After the donation from the State to the society, of the possession and occupancy—*FOREVER*—of the lot described in the act of 1850, who

would have consented to purchase, from the State, that—which we are told—remained of its entirely shorn title, and of its more than naked ownership? The possession willingly relinquished and transferred by the proprietor, and which—by an express stipulation assented to by him—is to be perpetually enjoyed by his transferee, and—after the latter—by his legal representatives, and from generation to generation, is far more valuable than the nameless ownership retained by the proprietor, and which—by such a stipulation—would, and forever, be divested of the attributes which constitute its value. The pretended ownership, which—at no time—is to be reunited to a permanently severed and transferred possession, is not an ownership known to, or sanctioned by our laws.

The donation from the State to the society was a donation of the entire right which the State had in and to the lot. The State so construed it: the State caused it to be assessed as belonging to the society, levied taxes upon it, and seized it for the satisfaction of the taxes so levied. The Legislature of the State rented it from the society, and it is manifest, the State—as to the property donated—reserved but one right, one which it could exercise only in case the society failed to do and perform any of the acts required of it by the second section of the act of 1850, and that was the right to forfeit—for its own use—the buildings and improvements which were to be erected on said property, and to resume the possession which—otherwise—was to be perpetually enjoyed by the donee.

In 1877—after its resurrection—the society intervened in this suit, and—for the first time—contested the validity of the proceedings by which it was put in liquidation. The terms of its intervention, which was not pressed in the lower court, and which—here—seems to have been abandoned, are indefinite and vague. It could not deny that its charter had expired by limitation, that it was solvent, that neither its charter nor the general laws of the State contained any provision as to the mode of the liquidation of its affairs. It does not deny the correctness of its creditor's demands, which was fully established by the declarations of its president and secretary; and it is shown that if those creditors had not paid, out of their own funds, the taxes levied and due on the society's institute—the whole of its immovable property which—when that payment was made—had already been seized for said taxes, would have been sold under that seizure.

The appointment of a liquidator, under these circumstances, was—not only proper—but indispensable, as well in the interest of the society as in the interest of its creditors, and—as held in *Stark vs. Burke et als.*—"there can be no question as to the power of the court, to appoint a receiver, *ex proprio motu*, in order to prevent the confusion and dilapi-

In the matter of the Mechanics' Society.

·dation consequent upon the abandonment of a company's affairs, produced by the inefficiency of the law," etc. 5 A. 740—3 A. 182.

Had the society the power to borrow money and to mortgage its property to secure its reimbursement?

By the act of the 17th February, 1821, incorporating the society, it was declared "capable at all times hereafter of taking, receiving, purchasing, and possessing and enjoying, *all kinds of estates and effects whatsoever, whether real or personal*, to an amount not exceeding \$200,000, and the same to sell, grant, convey and dispose of," etc.

"A corporation authorized to dispose of its property may, in general, dispose of any interest in the same it may deem expedient, having the same power in this respect as an individual. Thus it may lease, grant in fee, in tail, or for term of life, mortgage, and though insolvent, assign its property in trust for the payment of its debts, defeating by preference where the law allows it, even the priority of the State," etc.

Angell & Ames, 191—8 Ohio, 548—5 Wend, 590—1 Watts, 385—15 Ind. 459—32 N. H. 484—10 Allen 448—26 A. 738.

In *Bezon vs. Pike et als.* our predecessors said: "A corporation as an intellectual being, is vested with the powers necessary for the purposes for which it was incorporated, and can act only through its officers. The authority to make loans, execute notes, pledges, etc., by corporations, is not derived from or regulated by the law of mandate as contained in the Civil Code; but *from the law of its creation*, and—if not conferred by the express letter of its charter—may be inferred or implied from the powers actually conferred."

23 A. 789.

If it be true—which we do not concede—that the society was not authorized—by the law of its creation—to borrow the money which it needed to complete the improvements essential to the purposes for which it was organized and to its very existence, the lacking authority was—impliedly—delegated to it by the joint resolution adopted by the Legislature on the 28th of February, 1867, which declared "that the Mechanics' Society—the owners of the building now occupied as the State House, be and it is hereby *required and empowered* to make the necessary repairs, and to finish all the rooms throughout said building, the same to be ready for occupation on or before the first of November of that year."

It was to enable the society to do—within the space of time indicated in the resolution—that which it was thus *empowered and required* to do, that it subscribed and discounted the notes held and sued upon by A. Rochereau & Co. and the Factors' and Traders' Insurance Association, and it was—partly at least—with the proceeds of said notes that the authorized repairs were made and the edifice completed.

The claims of those creditors are just, the mortgage securing those claims valid: but, though the State has parted with the ownership of the hypothecated property, it has done so on specified conditions; and the enforcement of that mortgage can—in no way—change or alter those conditions. The society's rights in the property cannot be enlarged, those of the State cannot be reduced, by a sale made to satisfy said mortgage; and no purchaser can—by such a sale—acquire more or otherwise than the society did by the donation from the State. An already accrued forfeiture has been waived; but, for any legal cause which may have arisen, or which might arise from the date of that waiver, the State still retains the right to enforce the stipulated forfeiture.

It is, therefore, ordered, adjudged and decreed that the judgment appealed from is affirmed with costs.

ON REHEARING.

SPENCER, J. We held in our former opinion that the property in controversy in this case was donated by the State, subject to certain conditions, the non-performance of which entitled the State to retake it and the buildings put thereon. Not only is this right *especially reserved and stipulated in the act of donation itself*, but it flows irresistibly from the general principles of the law as laid down in the Civil Code. Article 1559 provides that "donations *inter vivos* are liable to be revoked or dissolved on account of the following causes: * * * The non-performance of the conditions imposed on the donee."

Article 1568. "In case of revocation or rescission on account of the non-execution of the conditions, the property shall return to the donor *free from all encumbrances or mortgages* created by the donee; and the donor shall have, *against any other person* possessing the immovable property given, all the rights that he would have against the donee himself."

Article 1569. "But in case of the non-fulfilment of conditions, which the donee is bound to fulfil, if it be proved to have proceeded from his fault, he may be condemned to restore the fruits by him received since his neglect to fulfil." But if the non-fulfilment proceeds from causes beyond his control, he is liable for fruits, only from the date of the "demand for the revocation."

These articles, with the exception of the last, are but the application, to the contracts of donation, of the general principles provided for all commutative and synallagmatic contracts, to wit, that there is a resolutive condition implied in all contracts, to the effect that non-per-

In the matter of the Mechanics' Society.

formance of an obligation by one party gives right of resolution to the other. The effect of the resolutive condition is retroactive, and puts the parties in the position of having never contracted. C. C. 2045. The consequence of which is that the acquirer of property under that condition will, on resolution, owe its fruits from the day of the contract, and the other party the principle and interest of the sums received. In the case of resolution of donations, this last principle is modified as we have seen by article 1569, by exempting the donee from restitution of the fruits prior to the demand in resolution, except in cases where it is proved that the non-performance has resulted from his fault. So far, therefore, from the right of the State to resolution being extinguished by the accidental destruction of the building, as claimed by counsel, its only effect would be to exempt the society from restitution of fruits and revenues—and perhaps, to a delay, which in such cases the court may accord, to enable the donee to perform the conditions and thereby avoid the resolution. C. C. 2047.

Under the operation of these elementary principles, aside from the express terms of the act of donation, it is manifest that any mortgages or encumbrances imposed upon the property by the donee, are subordinate to those paramount and underlying rights of the State, which will continue to exist "against any other person possessing the immovable property given," just as they exist "against the donee himself."

We fail to appreciate the relevancy or pertinency of the argument of counsel, touching the doctrine of "risks," as between "debtor" and "creditor." The right of resolution does not depend upon the question whether the obligor was or was not in fault. That question is only important as affecting liability for fruits and revenues, and perhaps in fixing the delay to be accorded for performance.

We see no reason to modify our former opinion and decree, and it is ordered that they remain undisturbed.

No. 7401.

THE STATE VS. SOLOMON WOMACK.

A verdict of conviction for larceny will be set aside when it appears that the information on which the defendant was tried, and convicted, only charged that he "attempted" to commit a larceny. Such a sentence is not responsive to, or justified by the charge, and the defendant's objections to it may be made after the trial and conviction.

A PPEAL from the Sixth Judicial District Court, parish of St. Helena.
Duncan, J.

J. M. Wright, District Attorney, for the State.

James H. Muse for defendant and appellant.

The opinion of the court was delivered by

DEBLANC, J. The defendant was tried for, and convicted of the offence of having "wilfully, illegally and feloniously shot, killed and attempted to carry away, with intent to steal, take, carry away and convert to his own use, a hog worth the sum of ten dollars—the property of W. T. Woodward—against his will, consent and knowledge, to his pecuniary loss and damage, contrary to the form of the statutes of the State of Louisiana in such cases made and provided, and against the peace and dignity of the same."

After trial and conviction, he was sentenced to imprisonment at hard labor, in the State Penitentiary, for the term of twelve months. He appealed, and relies on a motion which he made in arrest of judgment, and in which he charges that the information filed against him is not in legal form, and not sufficient to sustain the verdict.

The record shows that—in the lower court—the district attorney asked and obtained leave to file a bill of information, charging the accused with larceny—that, having been convicted of the crime of larceny, he was sentenced to imprisonment at hard labor for the term of twelve months.

These recitals and the nature of the penalty inflicted, leave no doubt that the district attorney, the judge and the jury were under the impression that the prisoner had been informed against, and—under that impression—he was tried, convicted and sentenced for the crime of larceny, which it may have been his intention to commit, but which—according to the averments of the bill of information—he did not carry into effect.

It is true that—if on the trial of any one for a crime and misdemeanor—it shall appear to the jury that he did not complete the offence charged, but that he was guilty only of an attempt to commit the same, he may be accordingly convicted and punished. This—however—refers to exclusively those crimes and misdemeanors, the partly executed attempt to commit which is itself a crime. For instance, if—upon the trial of any person upon an indictment for robbery, it shall appear to the jury upon the evidence, that the accused did not commit the crime of robbery, but that he did commit an assault with intent to rob, the jury shall be at liberty to so return as their verdict, etc.

Rev. St. 1053, 1054.

In this case, the offence charged in the bill of information is that described in section 815 of the Revised Statutes, which is punishable by fine not exceeding two hundred dollars, or imprisonment not exceeding six months, and the prisoner was tried, convicted and sentenced for a

State vs. Womack.

distinct offence, one which he may have intended to, but did not commit, one—the commission of which is not charged against him.

It matters not that the prisoner's objection to the proceedings was made after his trial and conviction: he stands convicted of and sentenced for a crime which is not charged against him, and—so far as we are informed by the transcript—does not appear to have been even tried for the real offence charged. The prisoner's objection to that irregularity, could not have been urged by demurrer or in a motion to quash—and, be this as it may—we can certainly not affirm a sentence which is not responsive to, and is not justified by the charge.

It is—therefore—ordered, adjudged and decreed that the verdict and sentence appealed from are annulled, avoided and reversed, and this case remanded to the lower court, there to be proceeded with *under the same bill of information*, but according to the views herein expressed and according to law.

No. 7247.

CITY OF NEW ORLEANS VS. LOUISIANA SAVINGS BANK AND SAFE DEPOSIT COMPANY.

Act No. 70 of the extra session of the Legislature of 1870, which incorporates the Louisiana Savings Bank and Safe Deposit Company, and which exempts the company from taxation except on real estate, does not exempt it from the payment of the license tax imposed by the city of New Orleans on all persons engaged in a similar business.

Where the Legislature has imposed a license tax upon those who pursue a certain calling, or business, it cannot in the absence of any valuable consideration, exempt any particular person, or persons pursuing that calling, or business, from the payment of the license. Such an exemption is unconstitutional.

A PPEAL from the Sixth District Court, parish of Orleans. *Rightor, J.*

Sam. P. Blanc, Assistant City Attorney, for plaintiff and appellee.

Chas. S. Rice, for defendant and appellant.

The opinion of the court was delivered by

MARR, J. The defendant corporation is appellant from a judgment condemning it to pay a license tax of \$1000, imposed by an ordinance of the City Council.

The answer denies the power and authority of the city to impose any license tax on defendant. The ground of exemption is not stated in the answer; but it is claimed under the act of 1870, extra session, No. 70, p. 154, incorporating the bank. Section three of this act, after

City of New Orleans vs. Louisiana Savings Bank and Safe Deposit Company.

stating the objects and powers of the corporation, adds, in the last clause, "and it shall be exempt from taxation, except on real estate." It does not appear that there was any consideration whatever for this exemption.

The amended charter of the city of New Orleans, act of 1870, extra session, No. 7, section 12, paragraph 20, specially empowers the Council to levy an equal and uniform tax on all property, real and personal, and to levy a license tax upon all persons pursuing any trade, profession or calling; "and said license tax shall not be construed to be a tax on property."

The city ordinance under which this license tax is claimed was adopted 19th December, 1876; and the first section, which fixes the yearly rate for the license, is as follows:

"Every bank, banking house, banking company or banking agency receiving deposits, or dealing in gold, silver, uncurrent money or exchange, or doing any banking business, one thousand dollars."

Defendant was doing a banking business; and it was specially authorized by section three of the act of incorporation "to receive on deposit money and valuables of every description, * * * and to pay out and deliver the same by check or otherwise."

Two questions arise for solution:

1st. Was it the design of the legislature, by the exemption in the act of incorporation, to relieve defendant of liability to the license tax imposed on other corporations pursuing the like business?

2d. Had the legislature the power under the constitution of 1868, art. 118, to grant such exemption?

FIRST. In the act amending the city charter, section 12, paragraph 20, the distinction is plainly drawn between the license tax and the tax on property. The tax on property is *ad valorem*, at a fixed rate per cent; the license tax is levied by classes, at a fixed sum on all who fall within each class respectively. When the word "tax," or "taxation" is used without prefix or qualification in revenue laws, an imposition on property, in general, is implied; and the burden on professions and callings is usually expressed by the phrase "license tax."

Exemptions are construed strictly; and when one claims that general laws, applicable to all persons in the same category with himself, do not apply to him, he must bring himself clearly within some positive exception. Section one of the act incorporating this bank, authorizes it to acquire such real estate as may be necessary for carrying on its business, a suitable banking house, for example, and such other real estate as may be acquired from the foreclosure of mortgages, in the collection of its debts. It was not the intention of the legislature to exempt such real estate from taxation, but only the personal property

City of New Orleans vs. Louisiana Savings Bank and Safe Deposit Company.

of the bank, its capital, for instance, which would probably be taxed as part of the individual property of the stockholders. The fair and reasonable interpretation of the last clause of section three of the act, "and it shall be exempt from taxation, except on real estate," is that the legislature had in view only that burden imposed upon property, *ad valorem*, which is aptly expressed by the word "taxation," and that it neither contemplated, nor intended to grant, exemption from that imposition on professions and callings, which, in common parlance, is denominated a "license tax."

SECOND. The constitutions of 1845, art. 127, and 1852, art. 123, authorized the legislature to tax all persons pursuing any occupation, trade or profession; but they did not use the word "license." Under both constitutions licenses were granted, and license taxes were imposed and collected. The constitution of 1868 requires all persons pursuing any occupation, trade or calling, to obtain a license, as provided by law. The language of the constitution, art. 118, is:

"The General Assembly *may* levy an income tax upon all persons pursuing any occupation, trade or calling. *And all such persons shall obtain a license, as provided by law.*"

The constitutions of 1845 and 1852, left it to the option of the legislature to levy an income tax, or a tax on occupations, trades and professions. The constitution of 1868 also makes the levy of an income tax optional; but it requires, by the use of the word "shall," persons pursuing occupations to obtain a license, *as provided by law*. This language implies, necessarily, that a license tax shall be imposed, where the license is required. If an income tax is levied, it must be upon all persons pursuing any occupation, trade or calling, that is, upon all persons having income; and a subsequent clause of article 118, requires this tax to be "*pro rata* on the amount of income, or business done." The words "all such persons shall obtain a license," do not mean all persons upon whom an income tax is levied; because the levying of that tax is optional. The word "such" simply designates, by reference to the enunciation in the preceding clause, the persons who are required to obtain a license, that is, persons pursuing occupations, trades and callings. The words "all such persons," are restricted in their meaning by the qualification, *as provided by law*. The legislature, therefore, must provide by law, what occupations, trades and callings are subject to the license tax; and what license tax shall be imposed upon each occupation, trade and calling.

It cannot be supposed that the framers of the constitution intended to require the priests and ministers of religion, the farmer, the day-laborer, and numerous other persons pursuing occupations, to obtain a license. The power, therefore, was left with the legislature to select the

City of New Orleans vs. Louisiana Savings Bank and Safe Deposit Company.

occupations, trades and callings, upon which the license tax should be levied. But all taxation is, by this article of the constitution, required to be equal and uniform. In the exercise of the discretion necessarily deferred to the legislature by the words "as provided by law," certain occupations, trades and callings may be omitted; but when any such omission is made, it must apply equally to all persons throughout the State pursuing the occupation thus omitted, and none of them can be subjected to the license tax. When the legislature has selected the occupations, trades and callings which are to be subjected to the license tax, the law of equality and uniformity requires that all persons in the State pursuing such occupations, trades and callings, according to their respective classifications, shall be subject to the license tax which is imposed upon each class respectively; and that none in any one of the classes shall be exempt.

The legislature must be understood not to have intended to violate the constitution. If it be conceded that, in selecting the occupations, trades and callings to be subjected to the license tax, the legislature might omit banking corporations, it would not thence follow that one such corporation alone might be exempted by a special law. On the contrary, the great law of equality and uniformity forbids any such special exemption; and requires that all the entire class, shall be exempt, or that all composing that class shall be subject to the same imposition.

Whatever the intention of the legislature may have been, whether it had or had not the power to grant any exemption to this bank, our conclusion is that the constitution forbids special individual exemption from the license tax; and that the city had the power and authority, by the express terms of the charter, to require this bank to pay the license tax, which the ordinance imposed on each and every bank pursuing the business of banking within the city limits.

The judgment appealed from is therefore affirmed with costs.

No. 7418.

T. B. FARRAR VS. H. R. STEELE.

A district attorney has a certain discretion as to how, when, and whom to sue in the name of the State. In a contest for the possession of an office under the Intrusion Act, he may, in his discretion, join either of the contestants as a party plaintiff, and the contestant whom the district attorney has refused to join as plaintiff, but offered to join as defendant in the suit, can not, on that ground, maintain a claim for damages against the district attorney.

A PPEAL from the Thirteenth Judicial District Court, parish of Tensas.
Hough, J.

E. Howard Farrar and *L. H. Reeves* for plaintiff and appellant.
Kennard, Howe & Prentiss for defendant and appellee.

The opinion of the court was delivered by

DEBLANC, J. In January 1877, Thomas P. Farrar was appointed, by the Governor of the State, as district attorney *pro tempore*, of the parish of Tensas. In February he took the oath of office, and—on the 26th of that month—presented, in the parish court, his commission and the oath which he had taken. In doing so, he remarked—as testified to by one of defendant's witnesses and denied by Mr. Farrar—that he did not expect to be recognized by the court at that time, but wished his commission spread upon the minutes so as not to lose his legal rights. H. A. Garrett was then acting, and—until June—continued to act as district attorney *pro tempore* of the parish of Tensas.

Defendant, who had been absent from, returned to that locality on the 29th of March, and—the day after his arrival—was waited on by Colonel Reeves, who submitted—for his approval and official signature as district attorney—plaintiff's petition against Garrett, for intrusion into the office, which he himself claimed and to which he was entitled.

Defendant—said Colonel Reeves—declined to accede to Mr. Farrar's request, on the ground that he did not want to interfere with the *status quo* which then existed; but stated that he would place the matter in such a shape as to settle it at the next term of the district court for the parish of Tensas. He—according to Colonel Reeves' declaration—spoke very fairly, and did not seem to question the fact that Mr. Farrar had been commissioned as district attorney *pro tempore*.

Shortly after this conversation, Mr. Steele left for Concordia, to attend the district court. Whilst there, he was again asked, by another friend of plaintiff, to sign the petition for intrusion, and again refused to do it. On the 6th of April, Mr. Farrar filed the present suit, in which he charges that defendant has wilfully and maliciously neglected and omitted to perform his official duties, and—on that account—claims against him, as actual and vindictive damages, the sum of fifteen hundred dollars.

In order to compel defendant to lend him his official assistance, plaintiff had to proceed against him by mandamus. In answer to the rule taken to that effect, he contended that he had been shown but one commission—that of Mr. Garret, and that—if Mr. Farrar held a commission for the same office, it had issued in error and was a nullity.

On the 26th of April, the provisional mandamus was made absolute, and—on the 16th of May—defendant, as district attorney, joined plaintiff in a suit against Mr. Garrett for the office in dispute. That suit was, on the 23d of June, finally decided in favor of plaintiff, who—in September—brought an action against his competitor, and obtained, against

him, a judgment for the emoluments diverted by the intrusion, and—in October—brought another action against the parish of Tensas for the fees due him as district attorney *pro tempore*, from the day he had qualified in that capacity.

The Attorney General and district attorneys are classed—by the constitution of our State—as officers of the judiciary department, and it is evident that—as a general rule—the powers conferred upon them are not purely ministerial. Their discretion is limited; but that—as a necessity—they do possess a discretion, is indisputable. In nearly every instance, they alone determine when, how and who to prosecute or sue in the name of the State.

Const. of 1868, art. 92, 94—Rev. St. from sec. 1140.

This court has twice held that a district attorney prosecuting on behalf of the State, may enter a *nolle prosequi* at his discretion, subject only to the right of defendant—after the trial has commenced and evidence given, to insist on the trial. In this respect, *neither the court nor the accused* has the right to control the attorney of the State. 6 R. 63; 8 R. 583.

“When duties which are purely ministerial, are cast upon officers whose chief functions are judicial, and the ministerial duty is violated, the officer, although for most purposes a judge, is still civilly responsible for such misconduct, when it is shown that his decisions were not only erroneous, but that he acted from a spirit of wilfulness, corruption and malice.”

44 Mo. 491—32 Ind. 239—6 W. Va. 486—20 Am. Rep. 431.

The law provides that “when any person shall usurp, intrude into or unlawfully hold or exercise any public office or franchise within this State, it is made the duty of the district attorney or district attorney *pro tempore* of the parish in which the case arises, and for the parish of Orleans of the Attorney General, to bring an action against the offending party or parties, when so required to do.”

Rev. St. sec. 1150, 1151.

“Whenever such an action shall be brought against a person for usurping or intruding into a public office, the district attorney or district attorney *pro tempore*, or the Attorney General—as the case may be—in addition to the statement of the cause of action—may set forth in the complaint the name of the person *rightfully* entitled to the office, with a statement of his right thereto; and, in such case, on proof that the defendant has received fees or emoluments belonging to said office, an order may be granted by a judge of a competent court for the arrest of said defendant,” etc.

Rev. St. sec. 1154.

Do these provisions impose, upon the State officers, a purely minis-

terial duty? When they are so required to do, it is made their duty to bring an action against *the offending party or parties*. To comply with this imperative instruction, how must they proceed, who must they join, when the application comes from both of the rival pretenders? Is their discretion so completely superseded, that they can not—even for the purpose of determining whom to join—ascertain who appears to be the offending party or parties. If so, what must they do, when the two applications are simultaneously presented?

When, and under what circumstances are the State officers commanded to interfere? When any public office has been usurped, intruded into or is unlawfully held. Unless and until they are satisfied—not only that the law has been violated—but *by whom* it was violated, they cannot know who is *the offending party* and against whom to bring the action. Must they interfere at the request of any claimant, though they may have every reason to believe that the claimant is himself attempting to intrude into the disputed office, and though honestly convinced that the party alleged to be the usurper is entitled to and lawfully holds the office? We believe not.

By the letter of the law, the Attorney General and district attorneys are expressly authorized to set forth, in the complaint, the name of the person *rightfully* entitled to the office, and—in order to comply with that provision of the law—they must necessarily have and exercise some discretion. Otherwise, how could they discover and set forth who is or is not rightfully entitled to the office? This leads to the conclusion that—though the State attorneys are bound to join one of the contestants, they cannot be compelled to join that of the contestant who—in their opinion—is the offending party.

The Supreme Court of New York held that “where, under the law, the Attorney General is empowered to determine in what cases proceedings by information in the nature of a *quo warranto* shall be instituted to try the title to any public office or franchise, he is regarded as vested with a discretion, the exercise of which is in its nature a judicial act, over which the courts have no control.” Here, the power conferred on the State attorneys is not as broad: they cannot legally decline to institute proceedings to try the right to an office; but it is within their discretion to determine in whose name the action shall be brought. The ministerial and imperative duty imposed upon them is—when they are so required—to bring the action without the least unnecessary delay, and it matters not—in such an action—whether the applicant be a plaintiff or a defendant. His interest and his rights are that it be promptly instituted, promptly tried and promptly decided. He could gain no advantage by appearing as a plaintiff, nor could he lose any by being a defendant.

Farrar vs. Steele.

To test the right to the contested office, the district attorney proposed to join Mr. Garrett in a suit against plaintiff, under the intrusion act: his proposition was not accepted. As to his motives in refusing his official assistance to Mr. Farrar, who had been regularly appointed and who—soon after—was judicially recognized as the district attorney *pro tempore* of the parish of Tensas, we cannot inquire. He has not exceeded the bounds of his discretion and is not liable in damages.

It is—therefore—ordered, adjudged and decreed that the judgment appealed from is affirmed with costs.

No. 7486.

CITY OF NEW ORLEANS VS. JOHN P. BECKER.

A resident of the city of New Orleans engaged in an occupation which subjects him to a license tax imposed by the city, has no right to an injunction to restrain the city from collecting the license, and enforcing the penalties prescribed for its non-payment. On the other hand the city may enjoin him from carrying on his business until his license is paid, and such an injunction, sued out by the city, cannot be dissolved on bond.

A PPEAL from the Sixth District Court, parish of Orleans. *Rightor*, J.

E. H. McCaleb, City Attorney, and *Sam. P. Blanc*, Assistant City Attorney, for plaintiff and appellee.

Frank Michinard for defendant and appellant.

The opinion of the court was delivered by

MARR, J. On the 13th March, 1879, John P. Becker filed a petition in the Sixth District Court praying for an injunction prohibiting the city and the police from interfering with him in his business; and to prevent the collection of a license tax.

He alleges that he is the keeper of a saloon, and as such is liable to a reasonable license tax; that he applied to the city for a license, which was refused, the city claiming \$2500, and \$50 additional for the Charity Hospital, under an ordinance of December, 1878, fixing the tax at that rate on coffee-houses with theatrical performances, with or without admission fee.

That he does not keep, and has not kept, during the year 1879, a coffee-house with theatrical performances, and is not liable for the license tax demanded; and that the city threatens to close his establishment, unless the license is immediately paid, and to seize it provisionally, in default of payment, by which he would suffer irreparable injury and ruin.

A preliminary restraining order was granted, and a *rule nisi*, re-

quiring the city to show cause on the 15th March, why the injunction should not issue as prayed for.

On the 14th March the city filed a petition in the same court, alleging that Becker was keeping a coffee-house with theatrical performances; that he had been conducting this business since January, 1879, and would continue to do so unless enjoined; that he refused to pay the license tax fixed by the city ordinance; and that his conduct not only deprives the city of a certain revenue, but seriously interferes with the police of the city, and, if permitted, will be productive of insubordination, and unlawful resistance to the laws and ordinances of the city.

That for the payment of the license tax the city has a privilege and a lien on the personal property of defendant, with the right to seize and sell the same; and the additional right to enjoin the defendant from carrying on the business until the license tax shall have been paid.

The prayer is for an injunction restraining defendant from continuing to carry on the business of keeping a coffee-house with theatrical performances until he shall have paid the license tax; and for judgment for the amount of the tax.

The injunction was granted as prayed for; and on the next day Becker took a rule on the city to show cause why it should not be dissolved on his giving bond, as provided by the Code Practice, art. 307.

On hearing, the court refused to grant the injunction prayed for by Becker; and also refused to dissolve on bond the injunction granted to the city. Becker appealed from both these orders.

We think the court did not err in refusing to grant the injunction as prayed for by Becker. The charter, act of 1870, extra session, page 36, section 12, paragraph 10, subjects all places for shows and exhibitions, and shops for retailing liquors, etc., to the police power of the city. Paragraph 20 authorizes the city to levy, impose and collect a license tax upon all persons pursuing any trade, profession or calling, and to provide for its collection; and section 21 provides that "upon the prayer of the city, * * * any court of competent jurisdiction shall enjoin the person or persons so liable to pay a license tax, and who shall refuse or neglect to pay the same, from continuing to carry on such business or profession until he shall have paid the same, and all costs and charges for the recovery and enforcement of the claim therefor."

This right of the city is wholly incompatible with the right of the taxpayer to enjoin the city in the collection of the license tax, or from interfering with him in carrying on his business. His application for an injunction is the refusal to pay the license tax, and would authorize the city to demand the injunction to prevent the continuance of the business. The object of the law is to enable the city to compel the prompt payment of the license tax; and that object would be defeated if the

taxpayer were allowed either to take the initiative, by enjoining the city, or to have the injunction granted to the city dissolved on bond. In either case he might by the necessary delays in the district court, and by appeal to this court, successfully resist the license tax for an entire year; and thus enjoy the privilege of carrying on his business, in defiance of the law, without complying with its requirements. In many cases, at the end of the litigation, the city would find no property to meet its demands.

Defendant does not state in his petition what business he carries on in his saloon. If it is not that for which the city demands the license tax complained of, the injunction which merely forbids him to carry on that business, will do him no harm; and if the city does not prove that he is, or that since the first of January he has been carrying on that business, he will not be condemned to pay the license tax sued for.

The injunction which defendant sought to obtain was neither more nor less than an attempt, on his part, to prevent the city from invoking the aid of the judicial tribunals to enforce its asserted charter rights. That is not a proper proceeding. He should have waited until the city resorted to the process authorized by law; and in defence of that suit, set up whatever he relied upon to defeat the demand.

The orders appealed from are affirmed with costs.

No. 7494.

G. S. GOLDSMITH VS. CITY OF NEW ORLEANS.

There is no law governing the amount of license tax the city of New Orleans may impose on persons pursuing any particular business. It is a question of expediency, of which the city authorities are the sole judges.

The license of \$2500 a year imposed by the city of New Orleans on persons who carry on the business of a coffee-house, or drinking saloon, with theatrical performances attached, is not unconstitutional, and the city cannot be enjoined from enforcing its payment.

A PPEAL from the Sixth District Court, parish of Orleans. *Rightor, J.*

Belden & Duvigneaud for plaintiff and appellant.

E. H. McCaleb, City Attorney, and *Sam. P. Blanc*, Assistant City Attorney, for defendant and appellee.

The opinion of the court was delivered by

MARR, J. The petition alleges that the plaintiff, Goldsmith, is owner and proprietor of a bar-room or coffee-house, in which building "he conducts what is known as a concert saloon, and in the same saloon or coffee-house where theatrical plays are performed, as so claimed by the

city, but which in truth, as to the concert saloon and theatrical plays as applied to your petitioner, is not true."

What the precise meaning of this paragraph in the petition may be we cannot tell; but the petition proceeds to state that the city demands of petitioner \$2500, license tax, and \$50, hospital tax; and unless he pays this tax his business will be closed.

He alleges that the ordinance imposing this tax is unconstitutional and void, because it discriminates against his business by charging for the same largely in excess of other business of the same character: that is, that some coffee-houses are required to pay \$75, and theatrical plays \$250, being \$325, "while for the same business petitioner is charged, as aforesaid, \$2500, besides the \$50 hospital tax, not imposed on others doing the same business."

He prays for an injunction restraining the city from collecting the license and hospital taxes, and the city and the police from closing his business.

The injunction was granted on plaintiff giving bond for \$250. The city moved to dissolve for insufficiency of the bond; and because the plaintiff is without right to enjoin the city in the premises. This motion was tried and taken under advisement on the 11th February; and on the 14th March the city obtained an order dissolving the injunction on bond.

On the 15th March the court dissolved the injunction on the motion submitted 11th February; and plaintiff appealed from the order to dissolve on bond, and from the judgment dissolving the injunction on the motion.

This case differs from Becker's, just decided, in that Becker alleged that he was not keeping a coffee-house with theatrical performances, while plaintiff clearly admits, by his uncandid and contradictory pleadings, that he is carrying on the precise business for which the city ordinance requires the license tax demanded. It also differs, in that Becker sought to bond the injunction granted to the city, while in this case the city obtained an order to bond the injunction granted to plaintiff. Plaintiff also alleges the unconstitutionality of the ordinance, which Becker did not do.

The city had the power, as we have seen in Becker's case, to impose the license tax. No law lays down any rule by which the amount of this tax shall be fixed. It is a question of expediency and of police regulation, of which the city authorities are sole judges; and the judicial tribunals have no power to control them in the exercise of this discretion.

As to the alleged discrimination, the license tax must be a fixed sum for each calling or business. Coffee-houses doing no other business than that of retailing beverages may be taxed \$75: theatres, which

minister to the intellectual tastes by scenic exhibitions, music, etc., without furnishing drinks or other refreshments, may be taxed \$250. Coffee-houses with vocal or instrumental music, or both, may be taxed \$1000; and coffee-houses with theatrical performances, may be taxed \$2500, without any infringement of the law of equality and uniformity.

A coffee-house with theatrical performances is neither a mere coffee-house, nor is it a theatre, in the sense of the law. It is a distinct business; and the license for such a business is not to be ascertained by adding to the coffee-house license that required for a theatre. The city authorities may have deemed it wise to suppress such establishments by imposing a heavy license tax: they may have considered them peculiarly dangerous to the public peace, and the tranquility of the neighborhoods in which they are located; and as destructive of good morals; especially with respect to the young and inexperienced, attracted to them by the extraordinary combinations by which they minister to sensuality. What the keeper of such an establishment has the right to require is, that all who pursue the same business shall pay the same amount as license tax; and that is what the city ordinance requires.

We incline to the opinion that article 307 of the Code of Practice does not apply to such injunctions as this; but it is not necessary for us to pass upon that point now; because the injunction was dissolved on the motion the day after the order to dissolve on bond was granted.

For the reasons stated in the case of Becker, just decided, we think the court erred in granting the injunction. If every taxpayer may arrest the city in the enforcement of its ordinances, and in the exercise of its police powers, and in the collection of taxes, by alleging the unconstitutionality of the law or ordinance, it would not be possible to administer the city government.

The judgment appealed from is therefore affirmed with costs.